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No. 95-469

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

ATLANTIC RICHFIELD COMPANY,
Petitioner,

v.

REBEL OIL COMPANY, INC., and
AUTO FLITE OIL COMPANY, INC.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a plaintiff claiming injury from price competition by a firm, lacking the market power by itself to recoup losses from predation, can avoid this Court's antitrust-injury limitation, which is fatal to its claims under the Sherman Act, by bringing "essentially the same claim" for primary-line price discrimination under Clayton Act § 2(a).

2. Whether, assuming arguendo that profits lost as a result of price competition by a firm lacking the unilateral market power to recoup its predatory losses can amount to antitrust injury, the Ninth Circuit nonetheless incorrectly ruled that a "lesser standard" may be used to prove recoupment through an oligopoly than is required to prove recoupment through a monopoly.

PARTIES IN THE COURT OF APPEALS

The parties named in the caption were the only parties in the court of appeals and are the only parties to this litigation.*

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* Pursuant to Supreme Court Rule 29.1, petitioner states that it has no parent company. The following are the subsidiaries and affiliates of petitioner which have issued shares to the public: ARCO Chemical Company, Lyondell Petrochemical Company, Vastar Resources, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Atlantic Richfield Company, through its undersigned counsel, petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit, which partially reversed summary judgment in favor of Atlantic Richfield.

OPINIONS BELOW

The order of the court of appeals (App. A), affirming in part and reversing in part the judgment of the district court, is reported at 51 F.3d 1421. The order of the court of appeals denying rehearing (App. B) is not reported. The district court's order granting summary judgment (App. C) is reported at 808 F. Supp. 1464. A related opinion of the district court (App. D) is reported at 133 F.R.D. 41.

JURISDICTION

The order of the court of appeals affirming, in part, and reversing, in part, the district court's order granting summary judgment was filed on April 7, 1995 (App. A). The petition for rehearing was denied on June 21, 1995 (App. B). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a), and Section 4 of the Clayton Act, 15 U.S.C. § 15(a), are reprinted in Appendix E.

STATEMENT OF THE CASE

This petition concerns a decision by the court below to reverse an award of summary judgment in favor of petitioner ("ARCO") on the claim against ARCO for alleged predatory, below-cost gasoline pricing allegedly in violation of Clayton Act § 2(a). The court *affirmed* summary judgment on the ground that respondents lacked antitrust injury for claims under Sections 1 and 2 of the Sherman Act, but applying a "lesser standard" of proof found antitrust injury for claims under Clayton Act § 2(a). (App. 40a, 42a). The matter came before the court of appeals after summary judgment had been entered in favor of ARCO, whereupon respondents ("Rebel") appealed.

The case arose when Rebel filed this antitrust suit against ARCO in January, 1990 (App. 5a). Rebel, like ARCO, distributes gasoline in both the wholesale and retail gasoline markets in Las Vegas, Nevada. Among various other claims, Rebel's complaint alleged (1) an attempt by ARCO to monopolize the "self-serve, cash only" gasoline market in Las Vegas, or, alternatively, the entire retail gasoline market; (2) a conspiracy between

ARCO and unnamed co-conspirators to monopolize the same market or markets; and (3) discriminatory prices in Las Vegas as compared to prices charged by ARCO for gasoline in Los Angeles, to Rebel's competitive detriment. The allegations of fact which were claimed to support those three claims were essentially identical: Rebel alleged that ARCO had engaged in predatory pricing by selling gasoline in Las Vegas below ARCO's cost.

Having commenced the action, Rebel embarked on its search for supporting evidence. In October, 1990, the district court granted ARCO's motion for a protective order to limit the scope of Rebel's discovery. (App. 7a, 62a). Discovery was limited to the issues of (i) ARCO's share of the relevant retail gasoline market in Las Vegas, and (ii) the issue of whether entry barriers exist with respect to that market. (App. 62a).

Rebel's claims evolved. Ultimately, Rebel alleged that ARCO had engaged in predatory pricing between 1983 and 1990 (App. 25a), and that ARCO had recouped its predatory losses through *supra*competitive prices from September, 1990, through mid-April, 1991 (C.R. 360 at 16-18). Although Rebel had previously argued that ARCO's prices in Las Vegas were below cost because they were *lower* than ARCO's prices in Los Angeles, adjusted for transportation cost, Rebel now claimed that ARCO's prices were "supracompetitive" when they were *greater* than ARCO's prices in Los Angeles, adjusted for transportation costs.[1]

Rebel's expert opined that ARCO's prices were below cost because they were less than the price for gasoline that ARCO allegedly paid to another refiner, Tosco Corp.,

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[1] On that theory, the only lawful price ARCO could charge would be a price *identical* to its Los Angeles price, adjusted for transportation cost. Rebel did not explain why ARCO must let its Las Vegas gasoline prices be dictated by competitive conditions in Los Angeles, rather than in Las Vegas.

under an exchange agreement. (App. 6a). The "expert" ignored undisputed evidence that the "price" for gasoline in his calculations was contractually required to equal the price paid *by* Tosco *to* ARCO for the equivalent quantity of crude oil.[2] Under the expert's theory of "marginal cost," ARCO would have sold gasoline below its marginal cost not only in Las Vegas, but also in Los Angeles and throughout its entire marketing territory for a period of seven years.

Rebel further alleged that ARCO enjoyed barriers to entry in the Las Vegas gasoline retail market. Rebel argued that a statute recently enacted by the Nevada Legislature, known as the Divorcement Law, precluded major oil companies from opening stations in Nevada through their own salaried employees, as opposed to the traditional method of gasoline marketing through franchised dealers. (App. 23a). Rebel contended that this legislation, as well as environmental regulations mandating the addition of ethanol or other oxygenates to fuel during several months of each year, constituted entry barriers that would enable ARCO to monopolize the market after other competitors had been excluded through predatory pricing. (App. 24a).

The district court rejected Rebel's contentions as a matter of law. *First*, the district court concluded that the "self-serve, cash only" market was not a relevant product market, and that the relevant market was the market for retail gasoline sales. (App. 51a). *Second*, the district court considered Rebel's argument that ARCO had captured 44% of that market. (App. 51a). The district court found that to be an insufficient market share to warrant an inference that ARCO, through predatory pricing, could eliminate competitors from the market and fore-

[2] The cash payments were an accounting device that were expressly required to net out at zero; the true measure of Tosco's compensation was the value of the non-gasoline by-products that it kept after delivering the gasoline.

close new entry. The district court thus concluded that Rebel could not prove antitrust injury as an element of its case under either Sections 1 or 2 of the Sherman Act, or § 2(a) of the Clayton Act. (App. 47a, 52a).

The Ninth Circuit affirms in part and reverses in part. The opinion (App. 1a) affirms the district court's conclusion that the relevant market was the market for retail gasoline sales. (App. 18a). With respect to the "attempt to monopolize" claim under Section 2 of the Sherman Act, the Ninth Circuit finds that a 44% share *might* be sufficient to support a finding of market power *if* "entry barriers are high and competitors are unable to expand their output in response to supracompetitive pricing." (App. 21a). However, the court finds that competitors had actually expanded their output during ARCO's alleged predatory price campaign, despite the allegedly significant entry barriers created by oxygenated fuel requirements and the Divorcement Law. (App. 31a). As a result, it affirms summary judgment on the Sherman Act § 2 claim.

The Ninth Circuit likewise affirms summary judgment with respect to the claim under Section 1 of the Sherman Act. Although Rebel alleged that ARCO conspired with its largest dealer in Las Vegas to fix retail gasoline prices at predatory levels (App. 32a), the court acknowledged that "Rebel does not allege that ARCO conspired *with its competitors* in Las Vegas to monopolize the market." (App. 33a) (emphasis added). In the absence of any such allegation, the Ninth Circuit correctly concludes that the same reasoning which warrants summary judgment on the claim under Section 2 also compels that result under Section 1. (App. 34a).

However, the Ninth Circuit *declines* to apply that reasoning to Rebel's claim under Clayton Act § 2(a). Although acknowledging that ARCO did not have "the degree of market power to raise the concerns of the Sherman Act" (App. 30a), it finds the very same evidence found to be insufficient in that context (*viz.*, a 44%

share of the market and "significant," albeit weak, barriers to entry) ample to satisfy the perceived "lesser standard" of proof under Clayton Act § 2(a). (App. 40a). Sufficient evidence of an oligopoly had been produced, the panel reasons, because (i) there were "significant" barriers to entry, such that new competitors would be "unlikely to enter the market . . . to challenge ARCO", and (ii) ARCO's market share "actually increased during the period when it was charging allegedly supracompetitive prices." (App. 40a, 41a).[3] The court states:

> In our discussion of Rebel's attempted monopolization claim, we concluded that Rebel's circumstantial evidence of market share and entry barriers in the retail market could not support a finding of market power to support an attempted monopolization claim, *in light of undisputed evidence of recent expansion by Texaco and Southland, two of ARCO's existing competitors.* We must evaluate that evidence again to determine whether Rebel has raised a disputed issue of material fact as to whether ARCO has the market power to "lessen competition" by enforcing an oligopoly. *The degree of market power need not be as high as in a monopolization claim. In light of this lesser standard, we conclude that Rebel has established a disputed issue of material fact as to its standing to state a cause of action under the Clayton Act.*

(App. 40a) (emphasis added).

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[3] A competitor's market share cannot possibly increase while it is charging supracompetitive prices unless all other competitors are charging even *higher* prices. Thus, ARCO's allegedly supracompetitive prices were competitive in relation to the prices charged by other market participants.

REASONS FOR GRANTING THE PETITION

This Court formulated the antitrust-injury requirement to screen out claims by private plaintiffs under Clayton Act § 4 that are inimical to antitrust policy even though the plaintiff can prove an antitrust violation. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990) (*"USA Petroleum"*); *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986) (*"Cargill"*); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) (*"Brunswick"*). *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (*"Matsushita"*). In each of these cases, the Court refused to permit a competitor to complain of price cutting by a firm that lacked the market power later to charge monopoly prices. Even though the Court assumed that the defendant's conduct violated the antitrust laws, it refused to allow a competitor to bring the challenge out of a concern that the lawsuit could be used to "chill the very conduct the antitrust laws are designed to protect." *Matsushita*, 475 U.S. at 594. It reasoned that antitrust policy would be better served in these circumstances by limiting the right to bring a lawsuit challenging price cutting to the government and to those private plaintiffs whose injury flowed from the anticompetitive aspect or effect of defendant's conduct. Implicit in the Court's reasoning was that those plaintiffs would complain if and only if the defendant's conduct injured competition, and not simply a single competitor.

The Ninth Circuit's decision fails to give full effect to these rulings. It finds that "any injury from ARCO's below-cost pricing is not antitrust injury" for purposes of Rebel's claims under the Sherman Act. App. 32a. However, the Ninth Circuit then decides that the very same injury can constitute antitrust injury for purposes of Rebel's primary-line price discrimination claim under § 2(a) of the Clayton Act. The Ninth Circuit reasons that all Rebel need do to satisfy the antitrust-injury re-

quirement for that claim is to prove that ARCO has sufficient market power to recoup predatory losses through oligopoly pricing. App. 39a. In so ruling, the Ninth Circuit commits the fundamental error of confusing antitrust injury with antitrust violation and erroneously relies on *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. ——, 113 S. Ct. 2578 (1993) (*"Brooke Group"*). *Brooke Group* expressly did not address the antitrust-injury requirement of Clayton Act § 4, but instead addressed only the injury-to-competition component of proving a violation of § 2(a) of the Clayton Act. 113 S. Ct. at 2585. Specifically, in *Brooke Group* the Court held that a firm lacking the power to monopolize nonetheless could violate § 2(a) of its discriminatorily low price was below cost and it had a reasonable prospect of recouping its predatory losses through oligopoly pricing. The Ninth Circuit's decision incorrectly allows this holding on the elements of a substantive violation of Clayton Act § 2(a) to control the entirely distinct antitrust-injury issue of Rebel's standing, as a competitor, to bring this lawsuit.

The Ninth Circuit's error effectively eliminates antitrust injury as a separate requirement in a primary-line price discrimination case. It allows any plaintiff to recover simply by proving that the defendant's conduct violated § 2(a) under *Brooke Group* and was a cause-in-fact of the plaintiff's injury. Indeed, the decision allows the least favored antitrust plaintiff—a competitor complaining of price cutting—to bring this lawsuit. This result cannot be justified by any overriding enforcement objective. The government can challenge this conduct in either a civil or criminal action if the defendant's conduct actually results in supracompetitive pricing. The Ninth Circuit's decision, moreover, would effectively eliminate the antitrust-injury bar on this type of claim under the Sherman Act by permitting the competitor-plaintiff who cannot bring a Sherman Act claim to bring instead what the Ninth Circuit

concedes is "essentially the same" claim under Clayton Act § 2(a). App. 35a.

In failing to apply the antitrust-injury requirement consistently to all antitrust claims by competitors challenging price cutting, the Ninth Circuit decision threatens consumer welfare, which is the primary concern of the antitrust laws. Thus, the competitor claims that the Ninth Circuit decision permits could chill price-cutting just as effectively as could the Sherman Act claims that even that decision recognizes are barred by the antitrust-injury requirement.

The potential chill on legitimate price cutting is made even more manifest by the Ninth Circuit's adoption of a "lesser standard" for determining injury to competition through an oligopoly than through a monopoly. There is no legal or economic justification for employing a lesser standard to prove supracompetitive pricing in an oligopoly as opposed to a monopoly. Virtually every economist agrees that predation makes less economic sense, and therefore is less likely to occur, in an oligopoly than in a monopoly. This Court's decisions are in accord. *See, e.g., Brooke Group,* 113 S. Ct. at 2590 ("tacit cooperation among oligopolists must be considered the least likely means of recouping predatory losses"). Moreover, the potential anticompetitive effect of the Ninth Circuit's rule is quite broad, because virtually half of all American manufacturing industries can be considered oligopolies. Accordingly, even if this Court were to agree with the Ninth Circuit that the low prices of a firm without unilateral market power can inflict antitrust injury through oligopolistic recoupment, it should grant certiorari to make clear that such a claim must be supported by evidence meeting a higher, not a lesser, standard of proof.

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S ANTITRUST-INJURY DECISIONS REJECTING COMPETITOR LAWSUITS ATTACKING LOW PRICES THAT DO NOT THREATEN RECOUPMENT THROUGH MONOPOLY

A. This Court Uses The Antitrust-Injury Requirement To Screen Out Claims That Are Inimical To Antitrust Policy Even Where The Plaintiff Can Prove An Antitrust Violation

In *Brunswick*, 429 U.S. at 489, this Court first held that Clayton Act § 4 imposes on a plaintiff the separate requirement of proving "antitrust injury," which the Court defined as injury "of the type the antitrust laws were intended to prevent and that flows from that which makes defendant's acts unlawful." The plaintiffs in *Brunswick* had won a jury verdict representing the profits they lost as a result of having had to compete against a bowling alley that would have gone out of business but for a merger found to violate Clayton Act § 7. The Court held that plaintiff's showing that its injury had been caused by an antitrust violation did not satisfy the antitrust-injury requirement. The Court instead ruled that it would be "inimical to the purposes of" the antitrust laws to award damages for profits lost as the result of increased competition. 429 U.S. at 488. The fact that the increased competition had been enabled by the antitrust violation was not determinative of the antitrust-injury issue because a competitor's lost profits were not the concern of the antitrust laws. Those laws "were enacted for 'the protection of *competition*, not *competitors*.' " 429 U.S. at 488.

This Court next addressed antitrust injury in *Cargill*, where it again held that a competitor plaintiff could not challenge a merger presumed to be illegal under § 7 of

the Clayton Act simply because the plaintiff had to compete against the merged company's low prices:

> To hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share.

479 U.S. at 116. The Court further stated that the only kind of price competition that possibly could inflict antitrust injury on a competitor was predatory pricing by a firm with a market share large enough to threaten monopoly. It noted that successful predatory pricing depends on "maintaining *monopoly* power for long enough both to recoup the predator's losses and to harvest some additional gain." 479 U.S. at 121 n.17 (emphasis added).

This Court's most recent antitrust-injury decision also involved a plaintiff seeking to recover losses suffered as a result of its competitor's low prices. In *USA Petroleum*, the Court once again assumed that the defendant had violated the antitrust laws, in that case by engaging in vertical maximum price fixing prohibited by § 1 of the Sherman Act. The Court, ruling that plaintiff's competitive losses were not antitrust injury, described the function of the antitrust-injury limitation as to "prevent losses that stem from competition from supporting suits by private plaintiffs for either damages or equitable relief." 495 U.S. at 342. The Court also reaffirmed that only predatory prices by a firm that either possessed or threatened to obtain monopoly power could inflict antitrust injury on a competitor. Thus, the Court rejected plaintiff's argument that it was not required to prove the Sherman Act § 2 element of dangerous probability of monopolization in order to bring its claim for violation of Sherman Act § 1:

> Respondent further argues that it is inappropriate to require a showing of predatory pricing before antitrust injury can be established when the asserted

> antitrust violation is an agreement in restraint of trade under § 1 of the Sherman Act, rather than an attempt to monopolize prohibited by § 2. Respondent notes that the two sections of the Act are quite different. . . . In sum, respondent maintains that it has suffered antitrust injury even if petitioner's pricing was not predatory under § 2 of the Sherman Act.
>
> We reject respondent's argument.

495 U.S. at 338-39. *See* Page & Blair, *Controlling the Competitor Plaintiff in Antitrust Litigation*, 91 Mich. L. Rev. 111, 119 n.48 (1992) ("Although dangerous probability is indeed a § 2 requirement, in a broader sense it is inseparable from any coherent definition of predatory pricing").

B. This Court Consistently Has Applied The Same Antitrust-Injury Requirement To All Claims By A Competitor Attacking Price Cutting Regardless Of The Type Of Antitrust Claim Involved

In *Brunswick*, *Cargill* and *USA Petroleum*, this Court stated that a plaintiff could establish antitrust injury from its competitor's pricing practices only by proving predatory pricing under § 2 of the Sherman Act even though none of those cases alleged a violation of that section. In *Brunswick* and *Cargill*, the plaintiffs alleged violations of Clayton Act § 7 and in *USA Petroleum* the plaintiff alleged a violation of Sherman Act § 1. The Court in *USA Petroleum* expressly recognized that the same antitrust-injury rule applied regardless of the underlying violation. *See USA Petroleum*, 495 U.S. at 340 ("We have adhered to this principle regardless of the type of antitrust claim involved"). In that opinion, the Court also rejected the argument that standards developed in *Brunswick* and *Cargill* in the context of a Clayton Act § 7 violation were inapplicable to the Sherman Act § 1 violation alleged in *USA Petroleum*:

> To be sure, the source of the price competition in the instant case was an agreement allegedly unlawful under § 1 of the Sherman Act rather than a merger in violation of § 7 of the Clayton Act. *But that difference is not salient.*

495 U.S. at 340 (emphasis added).

This holding shows the error of the Ninth Circuit's decision here to apply different antitrust-injury standards to each of Rebel's different antitrust claims. If the difference between § 7 of the Clayton Act and the Sherman Act is "not salient," then the difference in language between Clayton Act § 2(a) and Sherman Act § 2, on which the Ninth Circuit relies to justify its different antitrust-injury tests, is also not salient. The relevant language of Clayton Act § 2(a), at issue in this case, and § 7 is identical. Both prohibit conduct (§ 2(a) prohibits price discrimination and § 7 prohibits mergers) that "may . . . substantially . . . lessen competition or tend to create a monopoly." 15 U.S.C. §§ 13(a), 18. The statutory language therefore provides no basis for applying a different antitrust-injury test whether the source of the price competition is a discriminatorily low price in violation of Clayton Act § 2(a) or a merger illegal under § 7.

Nor does the language of the Clayton Act justify applying a lesser antitrust-injury standard than is applicable to Sherman Act claims. The Clayton Act prohibits conduct that lessens *competition*. It does not prohibit conduct that injures a *competitor*. The Act therefore is in accord with the fundamental principle that "[t]he antitrust laws were enacted for 'the protection of *competition*, not competitors.'" *USA Petroleum*, 495 U.S. at 338. Accordingly, the language of the Act provides no reason to depart from this Court's statements that prices that are low, but not predatory under Sherman Act § 2, cannot inflict antitrust injury on a competitor. *USA Petroleum*, 495 U.S. at 339-40. *See supra* at 10-12.

The policies underlying Clayton Act § 2(a) also support applying the same antitrust-injury standard as applied to other antitrust claims. "[W]hen defining the scope of antitrust injury for a violation of the [antitrust laws], it is the purpose of that legislation, and the interests it seeks to protect, which is controlling." *Greater Rockford Energy & Technology Corp. v. Shell Oil Co.*, 998 F.2d 391, 399 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1054 (1994). This Court long has recognized that the purposes of the Robinson-Patman Act, which amended Clayton Act § 2(a), and the interests it seeks to protect are such that it "should be construed consistently with broader policies of the antitrust laws." *Brooke Group*, 113 S. Ct. at 2586, *quoting Great Atlantic & Pacific Tea Co. v. FTC*, 440 U.S. 69, 80 n.13 (1979). This Court and the Circuit Courts also have recognized the similarity between claims for primary-line price discrimination under § 2(a) and claims for predatory pricing under Sherman Act § 2. *Brooke Group*, 113 S. Ct. at 2587 ("primary-line competitive injury under the Robinson-Patman Act is of the same general character as the injury inflicted by predatory pricing schemes actionable under § 2 of the Sherman Act"). *See, e.g., Henry v. Chloride, Inc.*, 809 F.2d 1334, 1345 (8th Cir. 1987). Professor Areeda has described "the key point" of these Circuit Court opinions as follows:

> [B]oth statutes require the identification of an improper price and the distinction between unjustified and justified pricing. There is really only a single analytical process for doing so . . . whatever one's definition of pro-competitive or anticompetitive pricing may be, it does not vary with the statutory words.

P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 720c (Supp. 1992); *see also* Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697, 727 (1975) ("[t]he basic substantive issues raised by the [Robinson-Patman] Act's concern with primary-line injury to competition and by the Sherman Act's concern with predatory pricing are identical").

C. The Ninth Circuit Errs In Relying On *Brooke Group*, Which Simply Announced The Standards For Determining Whether Competition Has Been Injured In A Primary-Line Price Discrimination Claim, To Resolve The Antitrust-Injury Issue Presented By Rebel's Claim

Notwithstanding this Court's clear direction to the contrary, the Ninth Circuit's decision applies a different antitrust-injury test to each of Rebel's different claims. The Ninth Circuit suggests that *Brooke Group* requires this anomalous result, even though it purports to recognize that "*Brook Group* is not necessarily controlling." Thus, the Ninth Circuit states:

> *Brook Group* addressed only the standards for liability in a primary-line claim. The standards for proving a violation differ from the standards for proving antitrust injury. Indeed, the antitrust injury requirement imposes a more stringent standard than the rules of liability.

App. 36a. After accurately stating that it should apply a "more stringent standard," the Ninth Circuit then proceeds to apply to the antitrust-injury issue exactly the same standard announced in *Brooke Group* for determining liability. Specifically, the Ninth Circuit holds that Rebel can "rely on evidence of oligopoly pricing to prove market power on its price discrimination claim." App. 41a. The Ninth Circuit offers as a reason for this ruling only this Court's holding in *Brooke Group* that "[a]lthough such evidence cannot support a claim of monopolization under the Sherman Act, no such limitation exists when the claim involves price discrimination under the Clayton Act." *Id.* The Ninth Circuit thereby commits error because this Court's holding related only to the different standards for proving violations under these two Acts.

While the plaintiff in *Brooke Group* was a competitor challenging price cutting, this Court expressly did not address the issue whether such a plaintiff's lost profits

could amount to antitrust injury necessary to bring its claim for primary-line price discrimination in violation of Clayton Act § 2(a). The District Court in *Brooke Group* had decided the antitrust-injury issue against plaintiff, as this Court recognized:

> [T]he District Court held that [defendant] was entitled to judgment as a matter of law on three *separate* grounds: lack of injury to competition, lack of antitrust-injury to [plaintiff], and lack of a causal link between the discriminatory rebates and [plaintiff's] alleged injury.

113 S. Ct. at 2585 (emphasis added). This Court then identified the "first issue"—lack of injury to competition—as "the only one before us." *Id.* This Court did not need to address the second issue—antitrust-injury—because its decision that plaintiff could not prove the injury-to-competition element of a substantive violation of Clayton Act § 2(a) provided an independent basis for affirming the judgment for defendant.

Nor does the Court's decision on the injury-to-competition issue provide guidance on the antitrust-injury issue. The former issue simply requires the court to find that there is some injury to the competitive market, whereas the latter issue requires the court to determine that the specific plaintiff's loss is the type of injury that makes the defendant's conduct unlawful. In resolving the former issue in *Brooke Group*, the Court relied on the injury that consumers would suffer if the defendant were able to recoup its predatory losses through oligopolistic price coordination and supracompetitive pricing in the cigarette market. That injury to consumer welfare was sufficient to establish the injury to competition needed for an antitrust violation. The Court's decision, however, does not support a competitor's claim to recover its lost profits, because it is the consumer's, not the competitor's, losses that are "of the type the antitrust laws were in-

tended to prevent and that . . . makes the defendants acts unlawful." *See Brunswick*, 429 U.S. at 489.

D. It Would Be Inimical To Antitrust Policy To Allow Competitor Lawsuits Under Any Antitrust Law Where The Plaintiff Attacks The Low Prices Of A Defendant Whose Market Share Is Too Small To Present Any Real Danger Of Monopoly Power

The consumer interest in competition is the touchstone of antitrust policy. Low prices are both the means of competition and the fruit of the competitive process. "[C]utting prices in order to increase business often is the very essence of competition." *Matsushita*, 475 U.S. at 594; *see Cargill*, 479 U.S. at 121 n.17 ("lowering prices . . . stimulates competition . . . ."); *USA Petroleum*, 495 U.S. at 340 ("low prices benefit consumers regardless of how those prices are set . . ."); *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 724 (1988) (interbrand competition leads to lower prices to consumers and for that reason is " 'the primary concern of antitrust law' "). The possibility that these low prices may deprive rivals of profits is of no concern under the antitrust laws. *See USA Petroleum*, 495 U.S. at 337 n.7 ("a firm cannot claim antitrust injury from non-predatory price competition on the asserted ground that it is 'ruinous'. [citations omitted] '[T]he statutory policy precludes inquiry into the question whether competition is good or bad' "); *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. ——, 113 S. Ct. 884, —— (1993) ("The purpose of the [Sherman] Act is not to protect businesses from the working of the market . . .").

Low prices can threaten the consumer interest in competition only when the firm charging the low prices is in a position to use those prices to eliminate its rivals and then recoup the losses it suffered through the low prices by charging supracompetitive prices. While *Brooke Group* allows a violation of Clayton Act § 2(a) to be proved through oligopolistic recoupment, there are more than

ample reasons not to allow a competitor to seek damages for such a violation unless it can satisfy the more stringent antitrust-injury requirement applicable to other antitrust claims by competitors.

The fundamental policy supporting such a rule is the desirability of avoiding lawsuits that create legal risks for price cutters. Those lawsuits "chill the very conduct the antitrust laws are designed to protect." *Matsushita,* 475 U.S. at 594; *see Sharp,* 485 U.S. at 728 (warning against lawsuits that cause "[m]anufacturers . . . to forgo legitimate and competitively useful conduct rather than risk treble damages and perhaps even criminal penalties"). For this reason, a clear-cut standard is needed for determining when competitors can challenge price cutting.

An antitrust-injury rule lacking clear standards for forecasting when a competitor can challenge price cutting will frustrate the goals of antitrust. A firm that is unsure whether its price cutting will precipitate treble damage lawsuits by its competitors will have a strong incentive not to cut prices at all. The First Circuit in *Barry Wright Corp. v. ITT Grinnell Corp.,* 724 F.2d 227, 234 (1st Cir. 1983) (quoted in part in *Matsushita,* 475 U.S. at 594), expressed this point succinctly:

> Rules that seek to embody every economic complexity qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve . . . we must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition.

See Baumol & Ordover, *Use of Antitrust To Subvert Competition,* 28 J. L. & Econ. 247, 254 (1985) (describing competitor lawsuits as "guerrilla warfare" that could intimidate a firm "into the sort of gentlemanly competitive behavior that is the antithesis of true competition").

An indefinite or unclear antitrust-injury rule also will provide a lack of guidance to courts. It therefore will significantly decrease the possibility of disposing of an antitrust lawsuit on summary judgment. The prospect of being forced to defend a lawsuit through trial, no matter how meritorious the defense, necessarily will encourage firms to avoid price-cutting activities that could expose them to litigation. *See* Snyder & Kauper, *Misuse of the Antitrust Laws: The Competitor Plaintiff*, 90 Mich. L. Rev. 551, 552, 588 (1991) (advocating bright line tests such as market-share screens to dispose of antitrust claims at the summary judgment stage: "[u]nless courts are able effectively to confine suits by competitor plaintiffs to those that are truly meritorious, and to do so relatively early in the litigation process, such suits may have significant anticompetitive consequences").[4] Moreover, the inability of firms to dispose quickly of meritless claims, combined with the consequent real possibility of a large treble-damage award, creates a strong incentive to settle such claims regardless of their lack of merit, further discouraging beneficial price cutting.

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[4] Professor Areeda agrees that market-share test are appropriate screens for analyzing predatory pricing:

> [I]t will sometimes be obvious at an early stage of discovery that there is no relevant market in which predation could create a dangerous probability of monopoly and thus in which predation has probably occurred. Dismissal of claims is presumptively appropriate whenever it appears that the defendant is not already dominant within a concentrated market or that entry barriers are too low to allow a hypothetical predator who has ruined rivals to maintain monopoly prices without causing reentry or new entry that would restore competitive prices.

P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 711.2b (Supp. 1992). According to Professor Areeda, most commentators agree that "predatory pricing is a plausible strategy only for a firm that begins with a very substantial market share." *Id.* at ¶ 711.2c. Professor Areeda further notes that "it seems reasonable to presume that a market share below 60 percent is too small to make predation likely." *Id.*

An indefinite or unclear antitrust-injury rule has the added disadvantage of encouraging competitor lawsuits challenging legitimate price cutting. Baumol & Ordover, *supra*, at 265 ("vagueness in the standards of unacceptable behavior plays into the hands of those who would use the antitrust laws as anticompetitive weapons"). Firms that are hurt by competition already have a natural incentive to use the antitrust laws to hinder pro-competitive behavior. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 34 (1984) ("[a]ntitrust litigation is attractive as a method of raising rival's costs . . ."); Baumol & Ordover, *supra*, at 252 ("[a]ntitrust, whose objective is the preservation of competition, by its very nature lends itself to use as a means to undermine effective competition. This . . . is very dangerous for the workings of our economy").

The dangerous probability of monopolization requirement satisfies the need for a clear-cut standard by providing a market-based filter to weed out baseless claims of illegal price cutting at an early stage of litigation. The Court has applied this standard to claims involving predatory conduct under Sherman Act § 2. Through the vehicle of antitrust injury, it also has applied this standard to Sherman Act § 1 claims brought by competitors in *USA Petroleum*, and has suggested its application to Clayton Act § 7 claims brought by competitors in *Cargill*. Because price cutting has the same competitive effect regardless of the statute under which it is challenged, courts should apply the same standard to the price cutting challenged in this case under § 2(a) of the Clayton Act.

The rule applied by the Ninth Circuit to Rebel's primary-line price discrimination claim does not provide the necessary clear-cut standard. In fact, as demonstrated below, the Ninth Circuit rule offers only uncertainty and ambiguity and, if allowed to stand, will encourage claims that deter beneficial price cutting.

The Ninth Circuit requires that Rebel prove only that ARCO "has a 'reasonable prospect' of enforcing oligopolistic pricing in Las Vegas, and thus of recouping its predatory losses." App. 39a. As discussed in Section II, the evidence upon which the Ninth Circuit relies to find that Rebel could meet this test is both very thin and highly ambiguous. For purposes of this Section, however, it is sufficient to note that the court proposes no definition of "oligopolistic pricing." In failing to define this term, the Ninth Circuit proposes a rule lacking the definiteness needed to ensure that pro-competitive conduct is not deterred.

It is far from clear that oligopoly can be precisely defined. *See* F. Scherer & D. Ross, *Industrial Market Structure and Economic Performance* 17 (3d ed. 1990) ("it is difficult to specify exactly where oligopoly shades into a competitive market structure"). Professor Areeda has recognized the difficulty of defining oligopoly:

> [D]emonstrating that a few firms share monopoly power is highly complex . . . one could define 'collusive' oligopoly in terms of concentration ratios, such as four firms accounting for seventy-five percent or more of a market. Such concentration measures, however have serious defects . . . .

Areeda & Turner, *Williamson on Predatory Pricing*, 87 Yale L.J. 1337, 1348 (1978). This difficulty injects an unwanted element of risk into vigorous price competition by encouraging competitor lawsuits aimed at restraining aggressive pricing. *See* Baumol & Ordover, *supra*, at 254 ("obscurity and ambiguity are convenient tools for those enterprises on the prowl for opportunities to hobble competition. As we know, it is not always necessary to win cases in order to blunt a rival's competitive weapons").

But even a workable definition of oligopoly cannot solve the problems. According to some economists, almost 50% of all U.S. manufacturing sectors are considered oligopolistic. Scherer & Ross, *supra*, at 82. This enor-

mous segment of American industry would need to think twice about whether or not to engage in vigorous price competition. Any firm in this segment, with no matter how small a market share, that decides to cut its prices would expose itself to the threat of a treble-damages lawsuit by an injured competitor. Moreover, such a firm would risk losing a lawsuit, for economists and academicians can undoubtedly spin out a theory of recoupment to fit almost any situation. In these circumstances, the firm likely would forego the price cut, depriving consumers of the benefit of lower prices.

The potential cost to consumers, moreover, is not outweighed by any purported benefits of the Ninth Circuit's rule. Predatory pricing by a potential monopolist is exceedingly rare and difficult to execute successfully because the predator has little or no assurance that the losses it incurs can ever be recouped. *Matsushita*, 574 U.S. at 589. Predatory pricing by one firm in an oligopoly (if it exists at all) must be far rarer, and incalculably more difficult to execute successfully, because the predator has much less of an assurance that its losses can be recouped. *See* Areeda & Turner, *Williamson on Predatory Pricing*, *supra*, at 1348 ("uncertain as the profitability of limit-pricing behavior may be for a monopolist, it is even more risky for a firm facing existing rivals accounting for forty percent of the market . . ."). In *Brooke Group*, 113 S. Ct. at 2590, this Court recognized that "tacit cooperation among oligopolists must be considered the least likely means of recouping predatory losses." There is thus little danger that the consistent application of a stringent antitrust-injury rule will permit substantial anti-competitive activity to go unpunished.

II. THE NINTH CIRCUIT'S DECISION INCORRECTLY APPLIES A "LESSER STANDARD" FOR DETERMINING INJURY TO COMPETITION THROUGH OLIGOPOLY THAN THROUGH MONOPOLY

Even assuming that this Court were to allow a competitor to satisfy the antitrust-injury requirement by showing injury to competition through oligopoly rather than monopoly, it should grant certiorari to clarify that such a plaintiff needs substantial evidence to take its case to a jury. This Court, in the context of finding that the plaintiff in *Brooke Group* had not proffered sufficient evidence to sustain the jury verdict in its favor, ruled that such evidence is required:

> [B]ecause relying on tacit coordination among oligopolists as a means of recouping losses . . . is 'highly speculative,' . . . competent evidence is necessary to allow a reasonable inference that it poses an authentic threat to competition.

113 S. Ct. at 2593. The Court based this need for "competent evidence" of injury to competition on its frequently articulated view that predatory pricing—particularly in situations where recoupment requires the cooperation of many firms—is highly unlikely. Thus, in *Matsushita*, the Court first noted that even single-firm predatory pricing is "implausible." 475 U.S. at 588-90. Then, the *Matsushita* Court observed that "such schemes are even more improbable when they require coordinated action among several firms." *Id.* at 590. Finally, in *Brooke Group*, the Court noted that:

> However unlikely predatory pricing by multiple firms may be when they conspire, it is even less likely when, as here, there is no express coordination. . . . This anticompetitive minuet is most difficult to compose and to perform, even for a disciplined oligopoly.

113 S. Ct. at 2590. Virtually every economist would agree that predation makes far less economic sense in an oligopolistic market than it does in a monopoly.

Notwithstanding this Court's skepticism that oligopolistic pricing can ever inflict competitive injury, the Ninth Circuit's decision adopts a "lesser standard" for proving such injury is an oligopoly than in a monopoly. App. 40a. The Ninth Circuit thereby turns on its head this Court's analysis of the relative likelihood of competitive injury through oligopoly and monopoly. In this regard, the Ninth Circuit completely misreads *Brooke Group* as allowing a "lesser standard" of proof of injury to competition. At most, *Brooke Group* lowers the minimum market share that an alleged predator must have in order to allow the plaintiff to withstand summary judgment to some percent of the market lower than that required in an attempt to monopolize case. But, nothing in *Brooke Group* suggests that the court should apply a "lesser standard" once the court's analysis of the evidence proceeds beyond the defendant's market share.

Yet, that is exactly what the Ninth Circuit's decision here does. It first holds that ARCO's market share, which it previously had found too low to threaten monopoly pricing given the nature and structure of the market (App. 31a), is not dispositive of Rebel's primary-line price discrimination claim. App. 39a ("Rebel need only prove that ARCO has a degree of market power to threaten oligopolization, not monopolization"). In the context of determining Rebel's antitrust injury, this was error for the reasons reviewed above. However, the Ninth Circuit compounds the error by not stopping there but instead re-reviewing all of Rebel's other evidence that the court had found wanting for purposes of proving injury to competition under the Sherman Act. The court found that Rebel may rely on this evidence, because

> [a]lthough such evidence cannot support a claim of monopolization under the Sherman Act, no such limitation exists when the claim involves price discrimination under the Clayton Act.

App. 41a.

Examination of the evidence on which the Ninth Circuit relies illustrates the arbitrariness of its flip-flop on this evidence. The Ninth Circuit points to only two pieces of evidence to justify its reversal of summary judgment. It first points to evidence that "ARCO's retail gasoline prices were higher in Las Vegas than in Los Angeles," theorizing that those higher prices represented ARCO's recoupment. App. 40a. But, this theory ignores the fact that the alleged recoupment phase in Las Vegas coincided with the national gasoline price increases caused by the Persian Gulf War, which began when Iraq invaded Kuwait in August 1990. It also ignores the implausibility of a theory under which ARCO could have recouped in eight months (from September 1990 to April 1991) losses suffered during four years of alleged predatory pricing (1986 to 1990). *See* C.R. 360 (Leffler Aff. ¶¶ 23, 31; Allvine Aff. ¶¶ 23, 33).[5] More fundamentally, it ignores the fact that ARCO's prices were the *lowest* of all major brands and that its market share increased even during this period of alleged recoupment. App. 40a. These facts are utterly inconsistent with the Ninth Circuit's reliance on these higher prices to prove injury to competition.

The only other evidence to which the Ninth Circuit points is supposed "evidence of significant barriers to entry in the Las Vegas retail gasoline market." App. 40a. The principal such barrier is the Nevada Divorcement law, which prohibits some, but not all, petroleum refiners from selling gasoline through direct operation of retail stores. The Ninth Circuit's reliance on this Divorcement Law is flawed in many respects. Most importantly, the Divorcement Law does not affect the more traditional means of gasoline distribution, namely, sales to dealers and distributors who market a refiner's branded gasoline under trademark license agreements. In fact, the Nevada

[5] The Ninth Circuit misreads the testimony of Rebel's experts when it finds twelve months rather than eight months of alleged recoupment. App. 7a.

law was enacted to assure a market niche for such franchises. Since the franchised method of gasoline marketing remains available to market entrants, the Divorcement Law is no barrier at all to competition. Moreover, it is ironic that the Ninth Circuit relies on this law as a barrier allowing ARCO to price predatorily when (1) ARCO's predatory pricing allegedly began before this law was enacted, (2) ARCO opposed the law in the Nevada legislature and (3) the chief advocate of the law was Rebel's president, who argued that the law was needed because ARCO was becoming too big. Apart from this supposed "barrier," there is no evidence with which to dispute the District Court's findings that the Las Vegas market was "dynamic," characterized by entry, exit and growth. App. 52a.

The flimsiness of the evidence the Ninth Circuit uses here to reverse summary judgment illustrates how potentially destructive of price competition its new rules can be. A competitor plaintiff, and its economic expert, can always conjure up theories at least as robust as Rebel presented here. Summary judgment therefore will never be available, exposing competitors and the courts to the risk that antitrust lawsuits themselves will be used to injure consumer welfare. This Court should grant certiorari to prevent this misuse of antitrust law to benefit competitors whose interests are not aligned with those of consumers.

CONCLUSION

For the reasons stated, the petition should be granted.

Respectfully submitted,

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September 19, 1995

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 92-16932

D.C. No. CV-90-00076-PMP

OPINION

REBEL OIL COMPANY, INC.,
a Nevada corporation;
AUTO FLITE OIL COMPANY, INC.,
a Nevada Corporation,
Plaintiffs-Appellants,

v.

ATLANTIC RICHFIELD COMPANY,
a Pennsylvania corporation,
Defendant-Appellee.

Appeal from the United States District Court
for the District of Nevada,
Philip M. Pro, District Judge, Presiding

Argued and Submitted
December 16, 1993—San Francisco, California

Filed April 7, 1995

Before: Cecil F. Poole, Robert R. Beezer and Andrew J. Kleinfeld, Circuit Judges.

Opinion by Judge Beezer

OPINION

BEEZER, Circuit Judge:

This case presents three antitrust claims arising from the defendant's conduct in the retail gasoline market in Las Vegas, Nevada. The plaintiffs contend that the defendant engaged in predatory pricing between 1985 and 1989, selling self-serve cash-only gasoline below marginal cost. The plaintiffs claim that the alleged predatory pricing was an attempt by the defendant to monopolize the market, in violation of Sherman Act § 2. The plaintiffs also claim that the predatory pricing scheme involved a conspiracy to restrain trade, in violation of Sherman Act § 1, and primary-line pricing discrimination, in violation of Clayton Act § 2, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a).

The district court granted summary judgment in favor of the defendant on all three antitrust claims, concluding that the defendant did not possess enough power in the market to allow the predatory scheme to succeed, and therefore that the plaintiffs had not suffered any injury cognizable under the antitrust laws. We have jurisdiction over the plaintiffs' timely appeal. 28 U.S.C. § 1291. We affirm in part and reverse and remand in part.

I

The evidence before the district court on summary judgment reveals the following facts: Gasoline sold in Las Vegas is first produced from crude oil in Los Angeles refineries. Wholesale marketers then pump the gasoline

to Las Vegas storage terminals via a common carrier pipeline operated by the Cal-Nev Pipeline Co. ("Cal-Nev"). Ninety-five percent of Las Vegas' gasoline travels this 250-mile route. Wholesale marketers sell the gasoline to retail marketers, who then sell the gasoline to Las Vegas motorists.

As of 1991, there were more than 275 retail gasoline stations in Las Vegas. Although the grades and types of fuel vary, retailers sell gasoline through two types of service. Some gasoline is sold only on a self-serve, cash-only basis. Motorists purchasing this product must pump their own gasoline and must pay cash. Other gasoline is sold on a full-serve basis. In full serve, a service station attendant pumps the gasoline for the consumer, checks the oil and tires, washes the windows and may perform other minor services. The motorist also has the option of paying either with cash or a credit card. The consumer pays a premium for these services, which means that the price for full-serve gasoline is generally higher than the price for self-serve gasoline. Some retail marketers sell only self-serve, cash-only gasoline; others sell both self-serve, cash-only gasoline *and* full-serve gasoline. No marketer sells only full-serve gasoline.

The plaintiffs, Rebel Oil Co., Inc., and Auto Flite Oil Co., Inc. (collectively "Rebel"), are retail marketers of gasoline in Las Vegas who sell only self-serve, cash-only gasoline. Rebel operates 16 retail stations under various gasoline brand names. Nine stations operate under the "Rebel" brand name, six stations operate under the "Unocal" brand name and one operates under the "Texaco" brand name. In addition to its retail sales, Rebel is one of the several wholesale marketers who ship gasoline via the Cal-Nev pipeline and sell to retail marketers.

The defendant, Atlantic Richfield Co. ("ARCO"), is a retail and wholesale marketer of gasoline in Las Vegas, as well as a major driller and refiner of crude oil in Los

Angeles. ARCO supplies gasoline to 53 retail stations in Las Vegas bearing the "ARCO" brand name. These stations sell only self-serve, cash-only gasoline. Of those 53 stations, Prestige Stations, a subsidiary of ARCO, owns and operates 15 stations. The remaining 38 stations are owned and operated by independent dealers who purchase the gasoline wholesale from ARCO and then sell the product at retail for their own account. Thirteen of these dealer stations are leased from ARCO; the remaining 25 dealer stations are operated by "contract dealers" who either own the stations or lease from third parties. The largest "contract dealer" is Terrible Herbst, Inc. ("Terrible Herbst"), which controls 23 stations under the "ARCO" brand name.

Besides Rebel and ARCO, other major retail marketers of gasoline in Las Vegas are Southland Corp. and Texaco Inc. As of 1991, Southland owned and operated 89 "7-11" stations, and Texaco owned and operated five gasoline stations. In addition, numerous independent dealers sell under varying brand names. These dealers either own the stations or are franchised dealers. Although the parties' offer conflicting numbers, it is undisputed that at least 67 independent dealers sell under the "Texaco" brand name; 16 independent dealers sell under the "Unocal" brand name; 17 independent dealers sell under the "Chevron" brand name; and 12 other independent marketers sell under various names. The number of stations operated by a marketer does not necessarily determine that marketer's share in gasoline sales. The "7-11" stations, for example, sell far less volume in gasoline than other marketers because their sales are primarily in the grocery retail market.

The facts of this case developed against a backdrop of change in the gasoline business. In the era of high fuel consumption motor vehicles, major-brand marketers affiliated with major oil companies were dominant. They

enjoyed superior locations and facilities, national advertising, and customer loyalty. Independent marketers, who purchased gasoline from major oil companies for resale under their own brand name, were minor participants—"middle-of-the-block dumps," in ARCO's words. Because they sold only self-serve, cash-only gasoline, independent marketers enjoyed low overhead and, hence, could charge less than stations selling equivalent quality gasoline under major brand names. During the 1970s, a growing number of cost-conscious motorists patronized these independent marketers. Independent marketers saw substantial growth in their business. Taking a cue, ARCO in 1982 adopted a nationwide strategy to compete directly with the independent discount marketers. Developed by ARCO's Special Planning Unit (SPU), the new strategy called for the elimination of full-serve and credit-card sales. Under SPU's new strategy, all sales would be self-serve and cash-only. Dealers would be provided with incentives, such as volume discounts, to increase sales volume and match the prices of the discount independents. In an internal memorandum, the SPU predicted that "depending on the degree and rapidity of competitive attrition, a lasting period of quite acceptable profitability could ensue." ARCO's new strategy increased its sales and market share nationwide.

In January, 1990, Rebel filed this antitrust suit against ARCO, pursuant to Section 4 of the Clayton Act, which allows private parties to sue antitrust violators for damages. Rebel claims that between 1985 and 1989, ARCO executed the SPU's new strategy in Las Vegas with "more specific vengeance," charging predatory prices in an attempt to take away market shares from its competitors and, eventually, monopolize the gasoline market in Las Vegas. Relying on affidavits obtained from former ARCO dealers, Rebel claims that ARCO controlled not only the prices charged at the 15 stations it operated through its subsidiary, Prestige Stations, but also the prices charged

at the 38 stations operated by independent dealers. Rebel also obtained affidavits from an expert who compared ARCO's prices in Los Angeles and Las Vegas markets. ARCO supplies both markets with gasoline from the same Los Angeles refinery. The expert concluded retail prices in Las Vegas for self-serve, cash-only gasoline, when adjusted for transportation costs, were consistently 6 to 14 cents per gallon below those charged in Los Angeles. The expert concluded that ARCO's retail prices in Las Vegas were consistently below the wholesale prices of all other wholesale suppliers in Las Vagas, and at times were 10 cents or more per gallon below ARCO's marginal cost.[1] Rebel contends that Terrible Herbst, ARCO's major contract dealer, conspired with ARCO in the predatory scheme.

Rebel asserts that ARCO's pricing scheme forced 37 competitors out of the Las Vegas gasoline market, including both independent discount marketers and major oil companies, such as Exxon, Shell, Conoco, Mobil and Philips. According to Rebel, non-ARCO stations decreased in number, from 258 to 222, during the alleged predation. Rebel contends that the marketwide attrition occurred despite the fact that Las Vegas is one of the fastest growing retail gasoline markets in the United States. Rebel's own share of the self-serve, cash-only gasoline market dropped from 30 percent in 1982 to less than 10 percent in 1990. Rebel claimed losses totalling $2 million, Rebel was forced to mostly withdraw from

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[1] Marginal cost is the cost that a firm incurs in the production of one additional unit of output. Herbert Hovenkamp, Economics and Federal Antitrust Law 10 (1985). Rebel measured ARCO's marginal cost based upon an agreement that ARCO signed with Tosco Corp. to purchase incremental supplies of gasoline. Rebel claims that ARCO bought the additional supplies of gasoline from Tosco because it was expanding output but was unable to obtain the additional output from its own refineries. The cost of this "last barrel" of gasoline represents ARCO's marginal cost for gasoline.

the retail market and instead concentrate on the wholesale market. Rebel claims it has stayed in business only through its non-gasoline revenues.

According to Rebel's expert affidavits, when the alleged predation ended in 1989 ARCO had captured 54 percent of the market for self-serve, cash-only gasoline. The experts contend that ARCO then engaged in price gouging in order to recoup the losses that resulted from the predatory scheme. To demonstrate that recoupment occurred, Rebel's experts compared ARCO's prices in Las Vegas with those charged in Los Angeles, adjusted for transportation costs. The data showed that from September 1989 through March 1990, and again from September 1990 through mid-April 1991, ARCO's prices in Las Vegas were between 4 to 19 cents per gallon higher than its prices in Los Angeles. Rebel contends that ARCO was able to charge prices above competitive levels without losing market share, demonstrating that ARCO had the power to harm competition in the gasoline market. Rebel contends that ARCO was able to maintain prices above competitive levels during the "recoupment" phase because Las Vegas marketers had been "disciplined" by ARCO's previous predation and refused to challenge ARCO's supracompetitive prices. In essence, Rebel contends that the Las Vegas gasoline market today is a "disciplined" oligopoly in which each oligopolist shares in the supracompetitive profits.

In the fall of 1990, the district court limited discovery solely to the issue of whether ARCO had sufficient market power to charge prices above competitive levels. *Rebel Oil Co. v. Atlantic Richfield Co.*, 133 F.R.D. 41, 44 (D. Nev. 1990). The district court justified the limited discovery on the ground that, absent a showing of market power, Rebel could not demonstrate that it suffered "antitrust injury" *Id.* There was no discovery on predatory pricing, intent and collusion.

In the fall of 1992, the parties filed cross motions for summary judgment. The district court granted summary judgment in favor of ARCO on all three antitrust claims. *Rebel Oil Co. v. Atlantic Richfield Co.*, 808 F. Supp. 1464 (D. Nev. 1992). The court concluded that ARCO's market share in the retail gasoline market in Las Vegas was insufficient as a matter of law to establish market power. In addition, the court concluded that Rebel failed to demonstrate that barriers to entry prevented other retailers from entering the retail gasoline market. The combined lack of market share and entry barriers, the court said, indicated that ARCO lacked the power to charge prices above competitive levels as a means of recouping predatory losses. In essence, the district court held that Rebel failed to put forth sufficient evidence of market power to support a jury verdict. *See Celotex v. Catrett*, 477 U.S. 317, 325 (1986) (summary judgment appropriate if nonmoving party fails to put forth sufficient evidence for an element essential to case).

II

Summary judgment is appropriate when the pleadings, affidavits and other material present no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. We review a grant of summary judgment *de novo* and evaluate the evidence most favorably to the nonmoving party to determine whether any genuine issues of material fact remain and whether the district court correctly applied the relevant substantive law. *Thurman Industries, Inc. v. Pay 'N Pak Stores, Inc.*, 875 F.2d 1369, 1373 (9th Cir. 1989).

Rebel contends that it produced sufficient evidence in the record regarding market power to create a genuine issue of material fact for trial for each of its antitrust claims. Rebel also argues that the court erred as a matter of law by applying a "monopolization" standard rather than an "attempted monopolization" standard to the Sherman Act § 2 claim. Rebel also argues that while a show-

ing of market power is necessary for the "attempt to monopolize" claim under Sherman Act § 2, no such showing is required for the price fixing claim under Sherman Act § 1 or the price discrimination claim under Clayton Act § 2. We analyze the issue of "market power" separately as to each of Rebel's three antitrust claims.

A

Rebel's attempted monopolization claim is based on the theory that ARCO conspired with its dealers to set predatory prices in an attempt to gain monopoly power. To establish a Sherman Act § 2 violation for attempted monopolization,[2] a private plaintiff seeking damages must demonstrate four elements: (1) specific intent to control prices or destroy competition; (2) predatory or anticompetitive conduct directed at accomplishing that purpose; (3) a dangerous probability of achieving "monopoly power"; and (4) causal antitrust injury. *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 811 (9th Cir. 1988).

The fourth element, causal antitrust injury, is an element of all antitrust suits brought by private parties seeking damages under Section 4 of the Clayton Act. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). Under Section 4, private plaintiffs can be compensated only for injuries that the antitrust laws were intended to prevent. *Id.* To show antitrust injury, a plaintiff must prove that his loss flows from an anticompetitive aspect or effect of the defendant's behavior, since it is inimical to the antitrust laws to award damages for losses stemming from acts that do not hurt competition. *Altantic Richfield Co. v. USA Petroleum, Inc.*, 495 U.S. 328, 334 (1990). If the injury flows from aspects of the defendant's conduct that are beneficial or

[2] Sherman Act § 2 states: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any person or persons, to monopolize . . . trade shall be guilty" of an antitrust violation. 15 U.S.C. § 2 (1994).

neutral to competition, there is no antitrust injury, even if the defendant's conduct is illegal *per se*. *See id.*

In deciding whether the plaintiff was injured by an anticompetitive aspect or effect of the defendant's behavior, care must be taken in defining "competition." Competition consists of rivalry among competitors. *Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034, 1040 (9th Cir. 1987), *aff'd*, 496 U.S. 543 (1990). Of course, conduct that eliminates rivals reduces competition. But reduction of competition does not invoke the Sherman Act until it harms consumer welfare. *Products Liab. Ins. Agency, Inc. v. Crum & Forster Ins. Cos.*, 682 F.2d 660, 663 (7th Cir. 1982); *see Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (Congress designed the Sherman Act as a "consumer welfare prescription") (quoting Robert H. Bork, The Antitrust Paradox 66 (1978)). Consumer welfare is maximized when economic resources are allocated to their best use, *National Gerimedical Hosp. and Gerontology Ctr. v. Blue Cross of Kansas City*, 452 U.S. 378, 387-88 & n.13 (1981), and when consumers are assured competitive price and quality. *Products Liab. Ins.*, 682 F.2d at 663-64. Accordingly, an act is deemed *anticompetitive* under the Sherman Act only when it harms both allocative efficiency *and* raises the prices of goods above competitive levels or diminishes their quality. *Cf. Brook Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578, 2588 (1993) (below-cost pricing is not anticompetitive in itself because, although it causes allocative inefficiency, it brings lower aggregate prices in the market).

The defendant's alleged conduct here involves predatory pricing. Predatory pricing occurs in two stages. In the first stage, or "price war" period, the defendant sets prices below its marginal cost hoping to eliminate rivals and increase its share of the market. During this phase, the predator, and any rival compelled to challenge the preda-

tory price, will suffer losses.[3] Though rivals may suffer financial losses or be eliminated as a result of the below-cost pricing, injury to rivals at this stage of the predatory scheme is of no concern to the antitrust laws. *Id.* Only by adopting a long-run strategy is a predator able to injure consumer welfare. *See Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 117 (1987). A long-run strategy requires the predator to drive rivals from the market, or discipline them suffiicently so that they do not act as competitors normally should. *Id.* If the predator reaches this long-run goal, it enters the second stage, the "recoupment" period. It then can collect the fruits of the predatory scheme by charging supracompetitive prices—prices above competitive levels. The predator's hope is that the excess profits will allow it to recoup the losses suffered during the price war. *Brook Group*, 113 S. Ct. at 2589.

In order unilaterally to raise prices above competitive levels, the predator must obtain sufficient market power. A predator has sufficient market power when, by restricting its own output, it can restrict marketwide output and, hence, increase marketwide prices. Phillip Areeda & Donald F. Turner, Antitrust Law ¶ 501, at 322 (1978) (hereinafter Areeda & Turner). Prices increase marketwide in response to the reduced output because consumers bid more in competing against one another to obtain the smaller quantity available. *Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1335 (7th Cir. 1986). Without market power to increase prices above competitive levels, and sustain them for an extended period, a predator's actions do not threaten consumer welfare.[4]

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[3] "Losses during a price war will be proportionally higher for the predator because he faces the necessity of expanding his output at ever higher costs, while the victim not only will not expand output but has the option of reducing it and so decreasing his costs." Robert H. Bork, The Anttirust Paradox 148 (1979).

[4] Social welfare is maximized when the price of a good equals its marginal cost—the cost of producing the last unit of output.

Market power may be demonstrated through either of two types of proof. One type of proof is direct evidence of the injurious exercise of market power. If the plaintiff puts forth evidence of restricted output and supra-competitive prices, that is direct proof of the injury to competition which a competitor with market power may inflict, and thus, of the actual exercise of market power. *See FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460-61 (1986). The more common type of proof is circumstantial evidence pertaining to the structure of the market. To demonstrate market power circumstantially, a plaintiff must: (1) define the relevant market, (2) show that the defendant owns a dominant share of that market, and, (3) show that there are significant barriers to entry and show that existing competitors lack of the capacity to increase their output in the short run. *See Ryko Mfg. Co. v. Eden Serv.*, 823 F.2d 1215, 1232 (8th Cir. 1987), *cert. denied*, 484 U.S. 1026 (1988); *Ball Memorial Hosp.*, 784 F.2d at 1335.

In opposing ARCO's motion for summary judgment, and in supporting its own cross motion, Rebel submitted circumstantial evidence to the district court purporting to show that ARCO possessed market power. We must determine whether this circumstantial evidence was sufficient to create a genuine triable issue with regard to market power in the Sherman Act § 2 claim.

1

We begin with the issue of market definition. As noted above, circumstantial evidence of market power requires that the plaintiff, at the threshold, define the relevant

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When a firm with market power cuts output to increase prices, price exceeds marginal cost. This causes a loss to society of all that additional output which the firm could produce by lowering its price to marginal cost. *Janich Bros., Inc. v. American Distilling Co.*, 570 F.2d 848, 857 n.9 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978).

market. A "market" is any grouping of sales whose sellers, if unified by a monopolist or a hypothetical cartel, would have market power in dealing with any group of buyers. *See* Phillip Areeda & Herbert Hovenkamp, Antitrust Law, ¶ 518.1b, at 534 (Supp. 1993) (hereinafter Areeda & Hovenkamp). If the sales of other producers substantially constrain the price-increasing ability of the monopolist or hypothetical cartel, these other producers must be included in the market. Stated differently, a "market" is the group of sellers or producers who have the "actual or potential ability to deprive each other of significant levels of business." *Thurman Indus.*, 875 F.2d at 1374. Market definition is crucial. Without a definition of the relevant market, it is impossible to determine market share.

There are two possible definitions of the market in the present case. Rebel contends the relevant market includes all retail sales of gasoline in Las Vegas, except for sales of full-serve gasoline. This is the market in which ARCO exclusively operates. ARCO disputes Rebel's narrow market definition. ARCO contends the market is broader, consisting of *all* sales of retail gasoline in Las Vegas, including full-serve gasoline.

The dispute between Rebel and ARCO focused on cross-elasticity of demand: whether consumers view the products as substitutes for each other. *See* E. Thomas Sullivan & Jeffrey L. Harrison, Understanding Antitrust and Its Economic Implications § 6.04[2] (1988) (hereinafter Sullivan & Harrison). If consumers view the products as substitutes, the products are part of the same market. Rebel's expert concluded that self-serve, cash-only gasoline and full-serve gasoline are not substitutes. He stated that consumers of full-serve gasoline base their purchase strictly on the availability of services, for which they pay a premium. Likewise, self-serve, cash-only gasoline consumers do not consider full-serve gasoline as a substitute, he said, because they wil always buy the lower cost gasoline, even if the premium for full-service is less than the cost of the service.

The district court accepted ARCO's position, concluding that both self-serve, cash-only gasoline and full-serve gasoline should be included in the relevant market. ARCO introduced affidavits from an expert who said the two products were correlated in price, indicating that the products are substitutes for each other.[5] The court said ARCO's affidavits were "more persuasive" than those submitted by Rebel. Rebel contends that the district court's use of the word "persuasive" indicates that the court improperly weighed the evidence, a role inappropriate at summary judgment. *See Lippi v. City Bank*, 955 F.2d 599, 613 (9th Cir. 1992).

Rebel correctly points out that the definition of the relevant market is a factual inquiry for the jury, and the court may not weigh evidence or judge witness credibility. *High Technology Careers v. San Jose Mercury News*, 996 F.2d 987, 990 (9th Cir. 1993). However, that an issue is factual does not necessarily preclude summary judgment. If the moving party shows that there is an absence of evidence to support the plaintiff's case, the nonmoving party bears the burden of producing evidence sufficient to sustain a jury verdict on those issues for which it bears the burden at trial. *Celotex*, 477 U.S. at 324. If Rebel's evidence cannot sustain a jury verdict on the issue of market definition, summary judgment is appropriate. *See id.* at 325. This rule does not direct courts to resolve questions of credibility or conflicting inferences. What it requires courts to do is assess whether

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[5] The price-correlation data purportedly showed that the prices of self-serve, cash-only gasoline and full-serve gasoline tend to move together, i.e., when one goes up, the other goes up, and vice versa. The expert noted that under the "Stigler" method of proving supply elasticity, high price correlation indicates that consumers view the products as substitutes for each other. *See* George J. Stigler & Robert A. Sherwin, *The Extent of the Market*, 28 J.L. & Econ. 555, 572-73 (1985). Self-serve sellers could not increase price and still expect to serve the same number of customers (and, hence, sell the same quantity of gasoline) as they did at the lower price.

the jury, drawing all inferences in favor of the nonmoving party, could reasonably render a verdict in favor of the nonmoving party in light of the substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-52 (1986). The determination requires application of the standard that courts apply in motions for a directed verdict or a judgment notwithstanding the verdict. *See id.* at 251.

As a preliminary matter, we note that expert opinion is admissible and may defeat summary judgment if it appears that the affiant is competent to give an expert opinion and that the factual basis for the opinion is stated in the affidavit, even though the underlying factual details and reasoning upon which the opinion is based are not. *Bulthuis v. Rexall Corp.*, 789 F.2d 1315, 1317 (9th Cir. 1985). While the affidavit of Rebel's expert meets this basic standard, the inference to be drawn from expert affidavits must, as *Anderson* requires, be sufficient to support a favorable jury verdict. In the context of antitrust law, if there are undisputed facts about the structure of the market that render the inference economically unreasonable, the expert opinion is insufficient to support a jury verdict. *Eastman Kodak Co. v. Image Technical Serv., Inc.*, 504 U.S. 451, ——, 112 S. Ct. 2072, 2083 (1992). As the Supreme Court explained

> When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict. Expert testimony is useful as a guide to interpreting market facts, but it is not a substitute for them. As we observed in *Matsushita*, "expert opinion evidence . . . has little probative value in comparison with the economic factors" that may dictate a particular conclusion.

Brook Group, 113 S. Ct. at 2598 (citations omitted) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio*

Corp., 475 U.S. 574, 594 n.19 (1986)). The inquiry is whether the inference to be drawn from the expert's opinion is "reasonable given the substantive law which is the foundation for the claim or defense." *See Richards v. Neilsen Freight Lines*, 810 F.2d 898, 902 (9th Cir. 1987).

Our independent review of Rebel's expert affidavits compels the conclusion that it would be unreasonable for a juror to infer from those affidavits that full-serve sales of gasoline should be excluded from the relevant market. Rebel's expert relied on "demand elasticity"—that is, whether a price rise in self-serve, cash-only gasoline would cause self-serve consumers to shift their demand to full-serve gasoline. A price differential between two products may reflect a low cross-elasticity of demand, if the higher priced product offers additional service for which consumers are willing to pay a premium. *Thurman Indus.*, 875 F.2d at 1376 (citing *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704, 715 (7th Cir. 1979) (drive-thru photo processing, for which consumers paid a premium, was relevant market apart from conventional photo processing). But defining a market on the basis of demand considerations alone is erroneous. *Virtual Maintenance, Inc. v. Prime Computer, Inc.*, 11 F.3d 660, 664 (6th Cir. 1993) (citing Areeda & Hovenkamp, ¶ 518.1, at 543), *cert. dismissed*, 114 S. Ct. 2700 (1994). A reasonable market definition must also be based on "supply elasticity." *Id.; Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 512 F.2d 1264, 1274 (9th Cir. 1975). Supply elasticity measures the responsiveness of producers to price increases. Sullivan & Harrison, § 6.02[3]. If producers of product X can readily shift their production facilities to produce product Y, then the sales of both should be included in the relevant market. Areeda & Turner ¶ 521a, at 354. The affidavit of Rebel's expert fails to account for the fact that sellers of full-serve gasoline can easily convert their full-serve pumps, at virtually no cost, into self-serve, cash-only pumps, expanding out-

put and thus constraining any attempt by ARCO to charge supracompetitive prices for self-serve gasoline. The ease by which marketers can convert their full-serve facilities to increase their output of self-serve gasoline requires that full-serve sales be part of the relevant market; it is immaterial that consumers do not regard the products as substitutes, that a price differential exists, or that the prices are not closely correlated. Areeda & Turner ¶ 521, at 354.

While sellers in a normally functioning market would convert their full-serve pumps to self-serve to restrain supracompetitive pricing by ARCO, Rebel's expert contended that Las Vegas is not a normally functioning market. Rebel states: "As the market actually functions, the full-service islands simply do not represent any competition to supracompetitive pricing by ARCO." Rebel contends that ARCO's predatory below-cost pricing has so punished existing marketers of gasoline in Las Vegas that these marketers are now a "disciplined oligopoly" and have no incentive to convert their pumps to challenge ARCO's pricing. This contention is irrelevant to market definition in the present context. Rebel's theory has no bearing on the threshold question of whether those marketers are *potential* competitors who should be included in the relevant market. *See Thurman Indus.*, 875 F.2d at 1374 (a relevant market includes those sellers who have the "actual or *potential* ability" to compete and deprive the defendant of significant amounts of business). The fact that some marketers are oligopolists does not mean they cannot deter an attempted monopolization. Even oligopolists may compete (and the oligopoly will vanish) if one of their number strays from the pack with the intent to violate the Sherman Act. *See* Bork, The Antitrust Paradox 101-04 ("Nothing in the theory [of oligopoly] compels the conclusion that oligopolists do not behave as competitors.").[6]

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[6] If we accepted Rebel's argument, we would be assuming the existence of ARCO's market power before defining the relevant

Although Rebel failed to demonstrate its proposed definition of the relevant market, this is not fatal to Rebel's attempt-to-monopolize claim. In the alternative, Rebel claimed that even if full-serve gasoline is included in the relevant market, ARCO would have significant market power. The district court found that the relevant product market included full-serve gasoline. We affirm that determination and are free to address the remaining issues regarding market power. *See R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 890 F.2d 139, 144 (9th Cir. 1989) (en banc).

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We next address the second factor in the market power analysis: market share. Measurement of market share is necessary to determine whether the defendant possesses sufficient leverage to influence marketwide output. With a dominant share of the market's productive assets, a firm may have the market power to restrict marketwide output and, hence, increase prices, as its rivals may not have the capacity to increase their sales quickly to make up for the reduction by the dominant firm. *Ball Memorial Hosp.*, 784 F.2d at 1335.

Rebel's experts contended that ARCO possessed a 44 percent share of the retail market consisting of both self-serve, cash-only gasoline and full-serve gasoline. As a preliminary matter, ARCO disputes Rebel's claim that it possesses 44 percent of the relevant market. The dispute essentially hinges on how to define ARCO as a "firm." ARCO directly operates 15 "ARCO"-branded stations in Las Vegas; another 38 "ARCO"-branded are operated

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market, a method of analysis that defies logic. Moreover, the purpose of defining the relevant market in an attempt-to-monopolize claim is to determine whether ARCO has sufficient market power to pose a threat of *monopoly*. The fact that the market is an oligopoly is of no concern, as an oligopoly is not *per se* illegal under Sherman Act § 2. *See Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409, 1415-16 (7th Cir. 1989).

by independent dealers who purchase the gasoline at wholesale from ARCO and sell at retail on their own account. ARCO points out that if only the 15 company-owned stations are aggregated, ARCO's market share is only 11.5 percent. Rebel contends that the sales capacity of the 38 dealer stations must be included in ARCO's market share because these independent dealers are not "independent" at all. Rebel claims that ARCO conspired with Terrible Herbst, the largest dealer and owner of 23 stations, in the predatory scheme.[7] As for the remaining ARCO dealers, Rebel presented affidavits from past and present dealers who stated that ARCO controls their retail prices. Rebel contends that because ARCO supplies gasoline at the wholesale level to these dealers, ARCO is in a position to influence the ultimate retail price. Rebel also cited pricing data showing that "ARCO"-branded stations are tightly clustered in product price and do not appear to act as independent entities.

The aggregation of market shares of several rivals is justified if the rivals are alleged to have conspired to monopolize.[8] *Cf. United States v. American Airlines, Inc.*, 743 F.2d 1114, 1122 (5th Cir. 1984), *cert. dismissed*, 474 U.S. 1001 (1985) (airline's unsuccessful attempt to fix prices with rival required aggregation of both firms' shares in attempt-to-monopolize claim). For the purpose of the summary judgment motion, the district court properly aggregated all "ARCO"-branded stations together,

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[7] As proof of conspiracy, Rebel submitted an article in a trade publication in which Ed Herbst, vice president of the family-owned business, was quoted as saying: "ARCO opened stores in Las Vegas and was selling 5 to 7 cents a gallon below what we paid wholesale. My dad said, 'If you can't beat them, join them.' So we joined them."

[8] To prove a conspiracy to monopolize, Rebel must show that the independent dealers had the specific intent to conspire to monopolize; it is not enough to show that the dealers merely agreed to go along with ARCO's pricing. *See Belfiore v. New York Times Co.*, 826 F.2d 177, 183 (2d Cir. 1987), *cert. denied*, 484 U.S. 1067 (1988).

accepting Rebel's premise that ARCO's share was 44 percent.[9]

In granting summary judgment to ARCO, the district court held that Rebel's evidence could not sustain a jury verdict in its favor, because a 44 percent market share was insufficient as a matter of law to give ARCO market power. The court, citing *Twin City Sportservice*, 512 F.2d at 1274, stated that "numerous cases" hold that any market share below 50 percent is insufficient.

Rebel argues that evidence of a 44 percent market share is enough to establish a genuine issue of material fact regarding market share. It contends that the district court erred because the court relied an a "monopolization" rather than an "attempt-to-monopolize" standard. Rebel argues that when a claim involves an *attempt* to monopolize, the quantum of market share necessary to create a genuine issue is smaller than is required in a claim of *actual* monopolization.

We agree with Rebel that the minimum showing of market share required in an attempt case is a lower quantum than the minimum showing required in an actual monopolization case. It is true, as the district court stated, that numerous cases hold that a market share of less than 50 percent is presumptively insufficient to etsablish market power. *See, e.g., Dimmitt Agri Indus., Inc. v. CPC Int'l, Inc.*, 679 F.2d 516, 528 (5th Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983); *Twin City Sportservice*, 512 F.2d at 1274. However, these cases and others cited by the district court involve claims of *actual* monopolization. When the claim involves attempted monopolization,

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[9] While the issue of collusion is a matter disputed by ARCO, the district court limited discovery strictly to the issue of market power. No discovery was allowed on collusion. Given that fact, all inferences on the issue of collusion must be drawn in Rebel's favor to properly determine the summary judgment motion. *See Fludd v. United States Secret Serv.*, 771 F.2d 549, 554 (D.C. Cir. 1985) (per curiam).

most cases hold that a market share of 30 percent is presumptively insufficient to establish the power to control price. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 26 n.43 (1984); *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1403 (7th Cir. 1989), *cert. denied*, 494 U.S. 1019 (1990); *Nifty Foods Corp. v. Great Atl. & Pac. Tea Co.*, 614 F.2d 832, 841 (2d Cir. 1908); *M & M Medical Supplies & Serv., Inc. v. Pleasant Valley Hosp., Inc.*, 981 F.2d 160, 168 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2962 (1993); Areeda & Turner ¶ 835c, at 349. ARCO's market share of 44 percent is sufficient as a matter of law to support a finding of market power, if entry barriers are high and competitors are unable to expand their output in response to supracompetitive pricing.[10]

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[10] The Fourth Circuit has stated that claims involving shares between 30 and 50 percent "should usually be rejected, except when conduct is very likely to achieve monopoly or when conduct is invidious, but not so much so as to make the defendant per se liable." *M & M Medical Supplies*, 981 F.2d at 168 (citing Areeda & Turner ¶ 835c, at 350). This standard, initially proposed by Professors Areeda and Turner, would include predatory conduct in the "invidious" category. In addition, a separate standard would presume market power if the market share is greater than 50 percent, if the other substantive elements of an attempt to monopolize claim are satisfied. *Id.* at 168.

We are reluctant to apply such bright-line rules regarding market share in deciding whether a defendant has market power to restrict output or raise prices. Courts should be "wary of the numbers game of market percentage" when considering attempt-to-monopolize claims. *Dimmitt Agri Industries*, 679 F.2d at 533. As Professors Areeda and Turner admit, their refined rules may be "illusory" guides to deciding market power. Areeda & Turner ¶ 835c, at 350. The far wiser approach, which this circuit has observed if not explicitly adopted, is illustrated by *Ball Memorial Hosp.*, 784 F.2d at 1335 (7th Cir.) and *Ryko Mfg.*, 823 F.2d at 1232 (8th Cir.), where the issue of market power was decided by carefully analyzing certain telltale factors in the relevant market: market share, entry barriers and the capacity of existing competitors to expand output. We see no reason to depart from this mode of analysis.

We next address the final factors in market power analysis: barriers to entry and barriers to expansion. A mere showing of substantial or even dominant market share alone cannot establish market power sufficient to carry out a predatory scheme. The plaintiff must show that new rivals are barred from entering the market and show that existing competitors lack the capacity to expand their output to challenge the predator's high price. *See Ryko Mfg.*, 823 F.2d at 1232.

Entry barriers are "additional long-run costs that were not incurred by incumbent firms but must be incurred by new entrants," or "factors in the market that deter entry while permitting incumbent firms to earn monopoly returns." *Los Angeles Land Co. v. Brunswick Corp.*, 6 F.3d 1422, 1427-28 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1307 (1994) (quoting Areeda & Hovenkamp, Antitrust Law § 409 at 509-10 (Supp. 1992)). The main sources of entry barriers are: (1) legal license requirements;[11] control of an essential or superior resource; (3) entrenched buyer preferences for established brands; (4) capital market evaluations imposing higher capital costs on new entrants; and, in some situations, (5) economies of scale. *Id.* at 1428 n.4. In evaluating entry barriers, we focus on their ability to constrain not "those already in the market, but . . . those who would enter but are prevented from doing so." *United States v. Syufy Enter.*, 903 F.2d 659, 672 n. 21 (9th Cir. 1990).

To justify a finding that a defendant has the power to control prices, entry barriers must be significant—they must be capable of constraining the normal operation of the market to the extent that the problem is unlikely to be self-correcting. *See Syufy Enter.*, 903 F.2d at 663.

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[11] "It is well known that some of the most insuperable barriers in the great race of competition are the result of government regulation." *United States v. Syufy Enterprises*, 903 F.2d 659, 673 (9th Cir. 1990).

Barriers to entry are insignificant when natural market forces will likely cure the problem. In such cases, judicial intervention into the market is unwarranted. For example, with easy entry, a predator charging supracompetitive prices will quickly lose market share (as well as any chance of reaping monopoly profits) as new rivals enter the market and undercut its high price. *See id.* at 664.

Rebel introduced affidavits from experts stating that potential new competitors in the Las Vegas market face high barriers to entry, the most significant being a legal license. Since July 1, 1987, Nevada law has barred major oil refiners from entering the market and directly operating gasoline stations. Nevada Divorcement Law, 15 Nev. Rev. Stat. § 598.677.[12] The law contains a "grandfather" provision that permitted existing company-operated stations to remain. At the time, ARCO owned 15 stations in Las Vegas, far more than any other major oil company. Because major oil refiners, which includes all Los Angeles refiners, are barred from entering, Rebel contended that only independent "chain" marketers or individual entrepreneurs are candidates to enter the Las Vegas retail gasoline market. Rebel claims that neither is capable of effectively competing with ARCO.

Rebel's experts contend that the unique nature and structure of the gasoline market in Las Vegas is a barrier to independent "chain" marketers who would seek to enter the market. Rebel argues there is no year-round independent source of wholesale gasoline in Las Vegas, demonstrated by the fact that 95 percent of the gasoline sold in Las Vegas arrives via the Cal-Nev pipeline. The Cal-Nev pipeline requires a minimum shipment of 420,000 gallons.

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[12] A refiner is barred if it meets three conditions: (1) produced more than 30 percent of the domestic and imported crude oil supplied to its refinery; (2) refines gasoline from crude oil; and (3) has a total refinery capacity of more than 175,000. 15 Nev. Rev. Stat. § 598.677.

Rebel's experts contend that because costs and quality maintenance limit storage of any shipment to one month, a new entrant must have the capacity to sell 420,000 gallons a month, which would require the acquisition of 10 to 15 retail outlets.

Apart from the large capital investment associated with opening and operating 10 to 15 stations, Rebel contends that both independent "chain" marketers and individual entrepreneurs would have trouble ensuring a reliable wholesale supply of gasoline at a competitive price, for two reasons. First, wholesale sellers will simply note market conditions and raise their wholesale prices, seizing the excess profits that are made available if ARCO raises its prices. Rebel's expert contends that historical data indicates that wholesale sellers have behaved in this manner. Second, since 1989, regulations in Clark County, Nevada, have required the use of oxygenated gasoline during six months each year. ARCO uses ethanol as an oxygenate, which is 3 cents per gallon cheaper than Methyl Tertiary Butyl Ether (MTBE), the oxygenate used by every other wholesale supplier. Rebel claims this is a significant cost disadvantage to new entrants. Rebel also introduced affidavits indicating that high capital costs of $7.5 to $15 million, the unavailability of loan capital, and the "chilling" effect of ARCO's prior predatory behavior discouraged potential new competitors in the market.

Assertions in expert affidavits do not automatically create a genuine issue of material fact. As noted above, we are obligated to look at the record to determine whether, in light of any undisputed facts, the inferences to be drawn from the expert's affidavits are reasonable. *Eastman Kodak*, 504 U.S. at ——, 112 S. Ct. at 2083. "When the expert opinion is not supported by sufficient facts to validate it in the eyes of the law or when indisputable record facts contradict or otherwise render the opinion unreasonable," summary judgment is appropriate. *Brook Group*, 113 S. Ct. at 2598.

It is undisputed that seven independent marketers, operating a total of 17 stations, entered the Las Vegas market between 1983 and 1990, not counting attempted entrants who failed in their first year of operation.[13] Most of the new rivals entered before 1988. Only two rivals entered after 1988, operating one station apiece.

Undisputed evidence of entry between 1983 and 1990, the alleged predation period, might contradict an inference that ARCO engaged in predatory pricing during that period, as a firm is unlikely to enter a market when a rival is selling products below cost. But it does not necessarily contradict the threat of market power, which is the issue in this appeal. The crux of Rebel's argument is that ARCO obtained or has come close to obtaining market power since the enactment of the Divorcement Law and the oxygenate regulations in 1987 and 1988, respectively. We know of no authority that would require, as proof of market power, evidence of entry barriers throughout the period of predation. Indeed, predatory claims, including Rebel's, suggest that market power is not gained until after years of below-cost pricing, during which competitors exit the market and the defendant's market share increases. To determine whether Rebel's claim of entry barriers is reasonable, we must consider those entries occurring *after* 1988, when the alleged barriers were in place and when ARCO allegedly obtained the power to charge supracompetitive prices. *See Cargill,* 479 U.S. at 120 n.15.

The fact that entry has occurred does not necessarily preclude the existence of "significant" entry barriers. If the output or capacity of the new entrant is insufficient to take significant business away from the predator, they are unlikely to represent a challenge to the predator's market power. *See Oahu Gas Serv., Inc. v. Pacific Resources, Inc.,* 838 F.2d 360, 367 (9th Cir. 1988), *cert.*

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[13] According to Rebel's own expert, these marketers included Domino's, Desert Bait, Green Valley, King 8 and Express.

denied, 488 U.S. 870 (1988); Department of Justice Merger Guidelines ¶ 3.0 (1992) (entry must be "timely, likely, and sufficient in magnitude, character and scope to deter or counteract the [anti]competitive effects of concern"). Barriers may still be "significant" if the market is unable to correct itself despite the entry of small rivals. This is the position taken by Rebel's expert. He claims the new entry after 1988 was *de minimis* because the new rivals were "all small independent dealers with insignificant volumes, whose operations do not contradict the existence of barriers to entry in the Las Vegas market."

We addressed a similar question in *Oahu*, which involved an appeal from the denial of a motion for judgment notwithstanding the verdict. In that case, we held that the entry of two rivals did not preclude the jury's finding that the defendant had actually monopolized the market. *Oahu*, 838 F.2d at 367. We explained that one rival's founder was a former executive for the monopolist, which supported the inference that his success in the market was not competition on the merits. As for the other rival, we noted that "evidence that the firm remained very small could reasonably preclude a decision that [the rival's] entry reflected a breakdown of barriers to entry." *Id.* at 367.

The same reasoning applies here. The conclusion of Rebel's expert that "significant" entry barriers were erected by the Nevada Divorsement Law and the oxygenate regulations is not contradicted or rendered unreasonable by the fact that two small rivals entered the market after the enactment of these laws. ARCO operates or supplies 53 "ARCO"-branded gas stations. A juror could reasonably conclude that two gasoline stations would have insufficient capacity to offset supracompetitive pricing by a would-be monopolist. Rebel's evidence on entry barriers is sufficient to create a genuine issue of material fact, but this does not end our inquiry.

Market power cannot be inferred solely from the existence of entry barriers and a dominant market share.

The ability to control output and prices—the essence of market power—depends largely on the ability of existing firms to quickly increase their own output in response to a contraction by the defendant. *Ball Memorial Hosp.*, 784 F.2d at 1336. Competitors may not be able to increase output if there are barriers to expansion. One such barrier is lack of excess capacity. Excess capacity is the capacity of the rivals in a market to produce more than the market demands at a competitive price. Hovenkamp, Economics and Federal Antitrust Law § 6.10, at 182. If existing competitors are producing at full capacity, they may lack the ability to quickly expand supply and counteract a predatory's supracompetitive pricing. *Id.* at 1335-36. On the other hand, if rivals have idle plants and can quickly respond to any predator's attempt to raise prices above competitive levels, the predator will suffer an immediate loss of market share to competitors. In that instance, the predator does not have market power. *See* Herbert Hovenkamp and Avarelle Silver-Westrick, *Predatory Pricing and the Ninth Circuit*, 1983 Ariz. St. L.J. 4433, 466 (1983).

Excess capacity is a technical concept that is difficult to measure without an analysis of a firm's costs. Instead, evidence of past output expansion may be used as a surrogate. If there is undisputed evidence indicating that competitors have expanded output in the recent past, or have the ability to expand output in the future, summary disposition may be appropriate. *See International Distrib. Centers, Inc. v. Walsh Trucking Co.*, 812 F.2d 786, 792 (2d Cir.), *cert. denied*, 482 U.S. 915 (1987); *cf. Oahu*, 838 F.2d at 366 (no market power exists in "a market with low entry barriers *or other evidence of a defendant's inability to control prices or exclude competitors.*") (emphasis added). Prior expansion by competitors would suggest that the defendant during that expansion lacked the market power to control marketwide output in the first place. *See id.* at 792-93. If a firm has not obtained that power and is not reasonably close to obtaining it,

"it matters little that high barriers to entry exist to help that firm maintain a monopoly power it could never achieve." *Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409, 1415 (7th Cir. 1989).

On this point, Rebel's claim of attempted monopolization falters. It is undisputed that in 1988 and 1989 two firms, Texaco and Southland, expanded their operations in Las Vegas by acquiring the assets of existing or bankrupt rivals. Texaco acquired 14 gasoline stations from the Exxon Corporation and turned the stations into dealerships. Another 21 former "Circle K" outlets became Texaco dealerships while "Circle K" was in bankruptcy, and another 5 "Jet" stations became Texaco dealerships. In addition, the Southland Corporation added 32 more stores to its chain of "7-11" stores by acquiring the assets of "Stop N Go" markets in Las Vegas.

Rebel argues that these acquisitions do not prove "expansion" occurred, because the acquisitions involved gasoline stations already in the market. The upshot of Rebel's argument apparently is that because there is no increase in stations, Texaco and Southland dealers have no ability to increase *marketwide* output than they did before the acquisition. Rebel's argument ignores an important fact: gasoline stations do not produce gasoline. Stations are merely retail distribution outlets. Gasoline is produced in Los Angeles refineries, then shipped to Las Vegas via the Cal-Nev pipeline. Competitors do not have to build more gas stations to satisfy customers' wants. They can simply purchase and transport more gasoline via the pipeline. *Cf. id.* at 1414 (to increase output to offset, grocery stores need not build new productive assets but can deliver more groceries from suppliers). This means that, where sufficient competing retail outlets exist, a would-be monopolist must control marketwide output at the *wholesale* supply level in order to pose any threat of monopolizing the *retail* market. In essence, Rebel must show that ARCO had monopoly power, or was dangerously close to achieving it, at the wholesale supply level. *See Los*

Angeles Land Co., 6 F.3d at 1429 n.6 (by failing to prove that defendant controlled the supply of bowling equipment, plaintiff failed to prove that defendant had market power in the retail bowling market).

As the expansion by Texaco and Southland suggests, the wholesale gasoline supply in Las Vegas is highly elastic, which does not support an inference that ARCO controls the supply of wholesale gasoline. Already supplying 22 dealers, Texaco undertook the task of supplying 34 more dealers in a very short time (six stations were not yet up and running). Although the volume of this increased supply is not contained in the record, it undoubtedly was substantial. Texaco's expansion occurred in 1989, about the time ARCO is supposed to have acquired market power. The expansion suggests that if ARCO attempted to curtail the total volume of gasoline sold to Las Vegas motorists, existing competitors could easily offset that action by delivering more gasoline. The expansion contradicts Rebel's position that ARCO is reasonably close to controlling the gasoline supply and retail gasoline prices. *See Indiana Grocery*, 864 F.2d at 1414.

Rebel's economic expert contends refiner-suppliers, such as Texaco, in reality will *not* deliver more gasoline to dealers if ARCO attempts to raise its price above competitive levels. Rebel explains that any retail dealers who attempt to challenge ARCO's high prices are prevented from doing so because refiner-suppliers are oligopolists who will raise their wholesale prices whenever ARCO raises its retail prices. As Rebel describes it, "retailers bear the brunt of bad times and are denied the fruits of good times."

To support his contention that refiner-suppliers are oligopolists who restrict the gasoline supply, Rebel's expert relied on pricing data showing that, in two successive periods, prices in Las Vegas were 4 to 19 cents higher than prices in Los Angeles, when adjusted for transporta-

tion costs. This is direct proof, Rebel says, that ARCO actually exercised market power in Las Vegas in an attempt to recoup predatory losses, and that the oligopolist refiner-suppliers joined the supracompetitive pricing. Rebel's experts concluded that ARCO recouped more than $14 million, with no loss of market share.

Rebel's evidence cannot, as a matter of law, be the basis for inferring market power in its attempted monopolization claim. Although oligopoly pricing cannot be ruled out as a plausible means to recoup predatory losses, *Brook Group,* 113 S. Ct. at 2590, oligopoly pricing standing alone does not prove that ARCO has market power, at least not the degree of market power to raise the concerns of the Sherman Act. "The fact that competitors may see proper, in the exercise of their own judgment, to follow the prices of another manufacturer, does not establish any suppression of competition or any sinister domination," and does not violate the Sherman Act. *In re Coordinated Pretrial Proceedings in Petroleum Prod. Antitrust Litigation,* 906 F.2d 432, 444 (9th Cir. 1990) (quoting *United States v. International Harvester Co.,* 274 U.S. 693, 708-09 (1927)), *cert. denied,* 500 U.S. 959 (1991). The reason for this rule is clear. To pose a threat of monopolization, one firm *alone* must have the power to control market output and exclude competition. *Indiana Grocery,* 864 F.2d at 1415. An oligopolist lacks this unilateral power. By definition, oligopolists are interdependent. An oligopolist can increase market price, but only if the others go along. Areeda & Turner, ¶ 1410b, at 64.

In *Indiana Grocery,* the Seventh Circuit rejected an argument similar to Rebel's. The plaintiff, Indiana Grocery, claimed that the defendant's predatory pricing "disciplined" rivals to the extent that the defendant and his rivals had engaged in oligopoly pricing. The court rejected the plaintiff's argument that oligopoly pricing indicated market power, stating

> Indiana Grocery's theory does not implicate section 2 of the Sherman Act. At best, it poses the danger that [the defendant's] anticompetitive conduct could result in diminished price competition in an oligopolistic . . . market. Section 2, however, does not govern single-firm anticompetitive conduct aimed only at creating an oligopoly. . . . ["]Congress authorized scrutiny of single firms *only when they pose a danger of monopolization.*"

Indiana Grocery, 864 F.2d at 1416 (quoting *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984)) (citations omitted); *cf. Crimpers Promotions, Inc. v. Home Box Office, Inc.*, 724 F.2d 290, 291 n.1 (2d Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984) (claim that two firms expressly colluded in an attempt to monopolize would be one of oligopoly under § 1 rather than monopoly under § 2). We recognize that a gap in the Sherman Act allows oligopolies to slip past its prohibitions, *see* Sullivan & Harrison, ¶ 6.07, at 262-63, but filling that gap is the concern of Congress, not the judiciary.

In summary, Rebel failed to establish a genuine issue of material fact on market power to support its attempted monopolization claim. Although there is genuine issue regarding market share and entry barriers, there appears to be no genuine issue regarding the ability of ARCO's existing competitors to increase their output. The undisputed record indicates that the gasoline supply in Las Vegas is highly elastic and that competitors could increase their output if ARCO raised prices. Consequently, Rebel failed to produce sufficient evidence to support a finding that ARCO is dangerously close to obtaining the power to monopolize the market. Rebel's failure to make a sufficient showing of market power demonstrates that ARCO's alleged predatory pricing has not threatened consumer welfare in a manner cognizable under § 2 of the Sherman Act. For this reason, Rebel cannot obtain dam-

ages, because any injury from ARCO's alleged below-cost pricing is not antitrust injury under Sherman Act § 2.

B

Rebel's claim under Sherman Act § 1 alleges that ARCO conspired with Terrible Herbst, its largest dealer, to fix retail gasoline prices in Las Vegas at predatory levels. To establish a Sherman Act § 1 violation for vertical, maximum price fixing,[14] a private plaintiff seeking damages must demonstrate: (1) collusion to fix predatory prices, and (2) causal antitrust injury. *See USA Petroleum*, 495 U.S. at 335-45.

Rebel argues that market power is not a prerequisite to antitrust injury if the claim is premised on Sherman Act § 1. It reasons that because vertical price fixing is *per se* illegal, *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 347 (1982), market analysis is not necessary. Rebel confuses proof of liability with proof of antitrust injury. *Per se* rules relieve plaintiffs of the burden of proving anticompetitive effects, which are assumed, but they do not excuse plaintiffs from showing that their injury was caused by the anticompetitive aspects of the illegal act. *Newman v. Universal Pictures*, 813 F.2d 1519, 1522-23 (9th Cir. 1987), *cert. denied*, 486 U.S. 1059 (1988). The "mere presence" of a *per se* violation under Sherman Act § 1 violation "does not by itself bestow on any plaintiff a private right of action for damages." *Indiana Grocery*, 864 F.2d at 1419. A plaintiff must prove that his injury flows from the *anticompetitive* aspect of the defendant's conduct. For example, in *USA Petroleum*, the plaintiff did not suffer antitrust injury from the defendant's conspiracy to fix low prices. Although *per se* illegal, maximum price fixing cannot cause antitrust injury because low prices are the "very essence of

[14] Section 1 states: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal." 15 U.S.C. § 1 (1994).

competition." *Id.* at 338 (quoting *Matsushita*, 475 U.S. at 594).

Unlike USA Petroleum, Rebel accuses ARCO of conspiring to fix predatory, *below-cost* prices. Some commentators have argued that a competitor harmed by a predator's below-cost pricing need not show market power in order to prove antitrust injury, because below-cost pricing harms consumer welfare by causing allocative inefficiency—that is, society's resources are allocated to the predated goods in amounts exceeding society's valuation of those goods.[15] *See* Roger D. Blair & Jeffrey L. Harrison, *Rethinking Antitrust Injury*, 42 Vand. L. Rev. 1539, 1564 (1989). The Supreme Court in *Brook Group* foreclosed this theory: "Although unsuccessful predatory pricing may encourage some inefficient substitution toward the product being sold at less than its cost, unsuccessful predation is in general a boon to consumers." *Brook Group*, 113 S. Ct. at 2588. Because below-cost pricing is a "boon to consumers," the losses inflicted on Rebel by the pricing are not the stuff of antitrust injury. It would be incongruous to award damages to plaintiffs for actions that in general benefit consumer welfare. *See Indiana Grocery*, 864 F.2d at 1419. To show antitrust injury under Sherman Act § 1, a plaintiff must show that the predator has market power.

Rebel does not allege that ARCO conspired with its competitors in Las Vegas to monopolize the market.

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[15] To put it another way, pricing below marginal cost is socially wasteful because the seller produces goods at a cost which is greater than their value to consumers. *Janich Bros.*, 570 F.2d at 857-58; Hovenkamp, Economics and Federal Antitrust Law, at 46.

As we have noted previously, allocative efficiency is synonymous with consumer welfare, *Chesapeake and Ohio R.R. Co. v. United States*, 704 F.2d 373, 376 (7th Cir. 1983), and is the central goal of the Sherman Act. *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1 (1958) (the Sherman Act "rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources.").

Thus, for the same reasons that we stated in our analysis of Rebel's claim under Sherman Act § 2, Rebel's evidence is insufficient for a jury reasonably to conclude that ARCO possesses market power, or is dangerously close to obtaining it, under § 1. In light of this conclusion, any injury-in-fact suffered by Rebel as a result of ARCO's alleged predatory maximum price fixing does not constitute antitrust injury.

C

Rebel challenges the district court's summary judgment in favor of ARCO on its price discrimination claim. As with Rebel's other claims, the court concluded that Rebel could not prove antitrust injury, because Rebel had produced insufficient evidence that ARCO possessed market power. The issues we address are twofold: whether a showing of market power is required to demonstrate antitrust injury in a primary-line discrimination claim, and, if so, whether Rebel presented sufficient evidence of market power for a reasonable jury to decide in its favor.

Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, prohibits price discrimination "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, *or* to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." 15 U.S.C. § 13(a) (emphasis added).

Price discrimination occurs in two forms: as a price differential between geographical markets, and as a price differential between purchasers. Price discrimination in the former sense, called primary-line injury, occurs when the seller charges predatory, below-cost prices in one market in an attempt to eliminate competitors there, and charges supracompetitive prices in another market. A competing seller in the predated market may claim injury. Price discrimination in the latter sense, called secondary-

line injury, occurs when a seller grants a favorable price to one purchaser but not another. In that case, the disfavored purchaser may use.

Rebel's claim alleged primary-line discrimination. As proof, Rebel's expert relied on pricing data showing that for four years, between 1985 and 1989, ARCO charged predatory prices in Las Vegas that, when adjusted for transportation costs, were 6 to 14 cents per gallon below those charged in Los Angeles. Rebel's expert also produced data showing that, from 1989 to 1991, ARCO intermittently charged prices in Las Vegas that were 4 to 19 cents per gallon higher than in Los Angeles. Rebel argues that this price discrimination shows that ARCO attempted to eliminate rivals and has charged supracompetitive prices to recoup its losses.

Because primary-line injury is of the "same general character" as predatory pricing schemes actionable under Sherman Act § 2, *Brook Group*, 113 S. Ct. at 2587, a primary-line injury plaintiff bears essentially the same substantive burden as a plaintiff under the Sherman Act. That is, to hold a defendant liable for charging below-cost prices, a primary-line plaintiff must show that the predator stands some chance of recouping his losses. *Id.* at 2588.[16] Under the Clayton Act, as amended by the Robinson-Patman Act, the standard is a "reasonable prospect" of recoupment. *Id.* This requires the plaintiff to show that the predator has market power, or that he has some reasonable prospect of obtaining it. Absent any chance of such showing, the below-cost pricing poses no threat to competition. *Id.*

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[16] The Supreme Court implicitly overruled *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967), a controversial case which set forth different standards for primary-line injury. The court explained that *Utah Pie* was merely an "early judicial inquiry." *Brook Group*, 113 S. Ct. at 2587.

1

The parties disagree over whether Rebel must show that ARCO has market power in order to satisfy the antitrust injury requirement. *Brook Group* is not necessarily controlling. *Brook Group* addressed only the standards for liability in a primary-line claim. The standards for proving a violation differ from the standards for proving antitrust injury. Indeed, the antitrust injury requirement imposes a more stringent standard than the rules of liability. *See J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981). Substantive liability looks to whether the defendant's conduct is forbidden; antitrust injury looks to whether the claimed injury "fall[s] squarely within the area of congressioanl concern." *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 484 (1982). "Thus, to define the scope of antitrust injury for a violation of the Clayton Act, it is the purpose of that legislation, and the interests it seeks to protect, which is controlling." *Greater Rockford Energy & Technology Corp. v. Shell Oil Co.*, 998 F.2d 391, 399 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1054 (1994). For example, because the Sherman Act's concern is consumer welfare, antitrust injury occurs only when the claimed injury flows from acts harmful to consumers.

We conclude that a plaintiff alleging primary-line discrimination must prove antitrust injury in the same manner that a Sherman Act plaintiff does—by showing that his injury flows from those aspects or effects of the conduct that are harmful to consumer welfare. Legislative history supports our conclusion. Congress first prohibited primary-line discrimination with the Clayton Act of 1914. In its original enactment, the Clayton Act forbid discrimination that might "substantially . . . lessen competition or tend to create a monopoly in any line of commerce." Clayton Antitrust Act, 38 Stat. 730 (1914). The statute specifically applied only to primary-line injury. Its purpose was to prevent large corporations from invading

markets of small firms and charging predatory prices for the purpose of destroying marketwide competition. *See* H.R. No. 627, 63rd Cong., 2d Sess. 8 (1914); Sullivan & Harrison, § 8.03, at 321. Like the Sherman Act, the original Clayton Act's primary aim was to prevent harm to consumers. *See Janich Bros., Inc. v. American Distilling Co.*, 570 F.2d 848, 855 (9th Cir. 1977) (both the Sherman Act and Clayton Act are "aimed at the same economic evil"), *cert. denied*, 439 U.S. 829 (1978).

In holding that a primary-line plaintiff must demonstrate an injury flowing from an aspect of the defendant's conduct injurious to consumer welfare, we intend in no way to affect the standard for antitrust injury in secondary-line cases. Secondary-line discrimination is forbidden by the Robinson-Patman Act, which amended the Clayton Act. It is clear that Congress intended the Robinson-Patman Act's provisions to apply only to secondary-line cases, not primary-line cases. *See* H.R. No. 2287, 74th Cong., 2d Sess. 8 (1936).[17] The Robinson-Patman Act stands on entirely different footing than the Sherman Act and Clayton Act. While the framers of the Sherman and Clayton Acts intended to proscribe only conduct that threatens consumer welfare, the framers of the Robinson-Patman Amendments intended to punish perceived economic evils not necessarily threatening to consumer welfare *per se*. Fairness and protection of secondary-line purchasers are the concerns of the Robinson-Patman Act, a conclusion that is confirmed by the language of the statute, legislative history and judicial precedent.[18] Accordingly, we have held that a secondary-

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[17] The Robinson-Patman Act "attaches to competitive relations between a given seller and his several customers. It concerns discrimination between customers of the same seller. *It has nothing to do with . . . requir[ing] the maintenance of any relationship in prices charged by a competing seller,*" H.R. Report No. 2287, 74th Cong., 2d Sess. 8 (1936).

[18] Enacted in 1936, the Robinson-Patman Act amendments were an outgrowth of dissatisfaction with the original Clayton Act's

line plaintiff can demonstrate antitrust injury if the price discrimination caused him to lose sales and profits; he need not demonstrate any injury to consumer welfare. *Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034, 1042 (9th Cir. 1987), *aff'd on other grounds*, 496 U.S. 543, 557-58 (1990); *accord J.F. Feeser v. Serv-A-Portion, Inc.*, 909 F.2d 1524, 1540 (3d Cir. 1990), *cert. denied*, 499 U.S. 921 (1991); *Alan's of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414, 1427 (11th Cir. 1990), *but also Boise Cascade Corp. v. FTC*, 837 F.2d 1127, 1143 (D.C. Cir. 1988) (injury to competitor may be rebutted by lack of

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inability to prevent large retail chains from obtaining "quantity discounts" from big suppliers, at the disadvantage of small retailers who competed with the chains. H.R. Report No. 2287, 74th Cong., 2d Sess. 3-4 (1936); S. Rep. No. 1502, 74th Cong., 2d Sess. 4 (1936); *FTC v. Morton Salt Co.*, 334 U.S. 37, 43 (1948).

The new law broadened the scope of the Clayton Act's provisions. While the Clayton Act only proscribed conduct that may "substantially lessen competition or tend to create a monopoly[,]" the new law added the following crucial passage: "or to injure, destroy, or prevent competition *with any person* who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." The purpose of this passage was to relieve secondary-line plaintiffs—small retailers who are disfavored by discriminating suppliers—from having to prove harm to competition marketwide, allowing them instead to impose liability simply by proving effects to individual competitors. H.R. Report No. 2287, 74 Cong., 2d Sess. 8 (1936). As the House Report stated:

> The existing law has in practice been too restrictive in requiring a showing of general injury to competitive conditions in the line of commerce concerned, whereas the more immediately important concern is in injury to the competitor victimized by the discrimination.

The Senate Report stated that the amendments aimed to prevent *competitor* injury as a means of preventing general market injury —"to catch the weed in the seed will keep it from coming to flower." S. Rep. No. 1502, 74th Cong., 2d Sess. 4 (1936). As the Supreme Court long ago stated: "Congress intended to protect a *merchant* from competitive injury attributable to discriminatory prices . . ." *Morton Salt Co.*, 334 U.S. at 49; *Greater Rockford Energy*, 998 F.2d at 399-400 n.11.

consumer injury). As a case involving secondary-line injury, not primary-line injury. *Hasbrouck* is not implicated by the present case.

To prove antitrust injury, Rebel cannot rely solely on evidence that ARCO charged lower prices in Las Vegas than in Los Angeles. Lower prices, even if below cost, are the essence of competition and are a "boon to consumers." *Brook Group*, 113 S. Ct. at 2588. To demonstrate antitrust injury in its primary-line claim, Rebel must show that ARCO has market power.

The required showing of market power in a primary-line claim is somewhat less than is required in a Sherman Act claim. In contrast to the Sherman Act, which speaks only of various forms of express agreement and monopoly, the Clayton Act, as amended by the Robinson-Patman Act, prohibits price discrimination that *may* lessen competition. *Brook Group*, 113 S. Ct. at 2591. Consequently, the Supreme Court has held that "excessive concentration, and the oligopolistic price coordination it portends, may be the injury to competition the Act prohibits." *Brook Group*, 113 S. Ct. at 2591 (citing *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963)). This suggests that Rebel need only prove that ARCO has a degree of market power to threaten oligopolization, not monopolization. Despite this difference, consumer welfare is still the lodestar for determining antitrust injury in a primary-line claim. To show a lessening of competition, it is not enough to show that the number of rivals has been reduced or that the market is concentrated. Rather, it must be demonstrated that a predator has a "reasonable prospect" of enforcing oligopoly pricing in Las Vegas, and thus of recouping its predatory losses. *Brook Group*, 113 S. Ct. at 2588.

2

We now consider whether Rebel's evidence is sufficient to show antitrust injury in its price discrimination claim.

In our discussion of Rebel's attempted monopolization claim, we concluded that Rebel's circumstantial evidence of market share and entry barriers in the retail market could not support a finding of market power to support an attempted monopolization claim, in light of undisputed evidence of recent expansion by Texaco and Southland, two of ARCO's existing competitors. We must evaluate that evidence again to determine whether Rebel has raised a disputed issue of material fact as to whether ARCO has the market power to "lessen competition" by enforcing an oligopoly. The degree of market power need not be as high as in a monopolization claim. In light of this lesser standard, we conclude that Rebel has established a disputed issue of material fact as to its standing to state a cause of action under the Clayton Act.

Rebel produced data showing that, during the alleged recoupment period, ARCO's retail gasoline prices were higher in Las Vegas than in Los Angeles, when adjusted for transportation costs. Rebel's experts opined that this is direct evidence of supracompetitive pricing by ARCO, as Los Angeles is a highly competitive retail gasoline market. Further, Rebel produced evidence that ARCO's market share actually increased during the period when it was charging allegedly supracompetitive prices. Rebel contends that this evidence indicates that ARCO's existing competitors in the retail gasoline market have been "disciplined" by ARCO's pattern of below-cost predatory pricing, and are unwilling to risk price competition with ARCO. Rebel argues that this is evidence that ARCO has achieved the market power to enforce a classic disciplined oligopoly, one of the anticompetitive effects that the Clayton Act prohibits. *See Brook Group*, 113 S. Ct. at 2591.

As we noted above, Rebel has produced evidence of significant barriers to entry in the Las Vegas retail gasoline market. This is crucial, because if entry is unimpeded, supracompetitive profit levels in the market would

attract new competitors to the market, who could undercut ARCO's prices and prevent it from recouping its predatory losses. *See Brook Group*, 113 S. Ct. at 2589. We have already determined that Rebel's evidence indicates that these barriers to entry are significant, and thus that new competitors are unlikely to enter the market at price and volume levels sufficient to challenge ARCO.

Rebel may rely on this evidence of oligopoly pricing to prove market power on its price discrimination claim. Although such evidence cannot support a claim of monopolization under the Sherman Act, no such limitation exists when the claim involves price discrimination under the Clayton Act. *Brook Group*, 113 S. Ct. at 2591. Further, the lack of evidence of output restriction is not so significant here. The economic forces at work in an oligopoly are very different than a monopoly. A predator is able to establish and maintain supracompetitive prices in an oligopoly by making it too painful for its existing competitors to challenge its prices, and thus, "disciplining" them. This distinction between oligopolistic and monopolistic practices is crucial to the survival of Rebel's price discrimination claim. Read in the most favorable light, Rebel's evidence tends to indicate that no new competition can enter the market to challenge ARCO, and that the existing competition, while it may be *able* to challenge ARCO, lacks the will to do so.

We conclude that Rebel has produced sufficient evidence to create a disputed issue of material fact as to whether ARCO has sufficient market power to maintain oligopoly pricing. Summary judgment on Rebel's price discrimination claim was therefore improper; Rebel may be able to demonstrate antitrust injury on this claim.[19]

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[19] ARCO argues that Rebel's continued presence in the Las Vegas Market undercuts Rebel's claim of antitrust injury. ARCO contends that, while oligopoly pricing hurts consumer welfare, Rebel, as a competitor in the market, stood to benefit from any oligopoly pricing. *See Matsushita*, 475 U.S. at 574. It is undis-

III

Rebel has failed to provide sufficient evidence to support a jury verdict on the issue of ARCO's "market power" under the Sherman Act. As a result, Rebel cannot establish a genuine issue of fact regarding antitrust injury on its Sherman Act § 1 and § 2 claims, and the district court properly granted summary judgment for ARCO on those claims. Rebel's evidence is sufficient, however, to raise a disputed question of material fact as to whether ARCO achieved sufficient market power to enforce supra-competitive oligopoly pricing.[20] This showing is sufficient to allow Rebel to survive summary judgment on the issue of antitrust injury resulting from price discrimination under the Clayton Act.

The judgment of the district court is AFFIRMED in part and REVERSED in part. WE REMAND to the district court for further proceedings consistent with this opinion.

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puted that during the peak of the alleged oligopoly pricing, when the cost of a gallon of gasoline was more than 19 cents higher in Las Vegas than in Los Angeles, Rebel's prices were within a penny of ARCO's prices. Rebel may have received gains during this period offsetting some of the lost profits it suffered during the period of ARCO's alleged below-cost pricing. Even if this is true, however, the argument goes to the *measure* of damages, rather than the *existence* of antitrust injury. If Rebel is ultimately able to prove injury resulting from anticompetitive conduct on the part of ARCO, it should not be precluded from recovery simply because it was not driven completely from the market.

[20] We, of course, express no opinion on the ultimate merits of the claim. At trial, Rebel may fail to establish a "reasonable prospect" of recoupment by ARCO, or ARCO may be able to prove facts sufficient to establish a defense to Rebel's claim.

APPENDIX B

[Filed Jun. 21, 1995]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-16932

D.C. No. CV-90-00076-PMP

REBEL OIL COMPANY, INC.,
a Nevada corporation;
AUTO FLITE OIL COMPANY, INC.,
a Nevada corp.
Plaintiffs-Appellants,

v.

ATLANTIC RICHFIELD COMPANY,
a Pennsylvania corporation,
Defendant-Appellee.

ORDER

Before: POOLE, BEEZER and KLEINFELD, Circuit Judges

Appellee's petition for rehearing is DENIED.

APPENDIX C

[Filed Oct. 15, 1992]

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CV-S-90-076-PMP (RJJ)

REBEL OIL CO., INC., and
AUTO FLITE OIL CO., INC.,
Plaintiffs,

v.

ATLANTIC RICHFIELD CO.,
Defendant.

ORDER

Before the Court for consideration are cross-motions for partial summary judgment filed on behalf of Defendant ARCO (#273) and Plaintiff Rebel (#360). The motions have been exhaustively briefed and the subject of oral argument conducted on Friday, October 9, 1992.

Rebel's Second Amended Complaint (#92) includes three causes of action under Section 4 of the Clayton Act: Count 1—unlawful price discrimination under the Robinson-Patman Act, 15 U.S.C. § 13(a); Count 6—price-fixing conspiracy under Section 1 of the Sherman Act, 15 U.S.C. § 1; and Count 7—attempt to monopolize under Section 2 of the Sherman Act, 15 U.S.C. § 2.

ARCO seeks partial summary judgment against Rebel as to Rebel's antitrust claims. ARCO also seeks summary judgment as to Count 8 of Rebel's Second Amended Complaint which alleges unfair trade practices in violation of Nevada Revised Statute 598A.060, as that cause

of action is based on the allegations supporting Rebel's federal antitrust claims. Rebel opposes ARCO's motion for partial summary judgment and in its countermotion seeks partial summary judgment on the issue of ARCO's market power.

STANDARD OF REVIEW

Pursuant to Federal Rule of Civil Procedure 56, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The party moving for summary judgment has the initial burden of showing the absence of a genuine issue of material fact. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982). Once the movant's burden is met by presenting evidence which, if uncontroverted, would entitle the movant to a directed verdict at trial, the burden then shifts to the respondent to set forth specific facts demonstrating that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). If the factual context makes the respondent's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *California Arch. Bldg. Prod. v. Franciscan Ceramics*, 818 F.2d 1466, 1468 (9th Cir. 1987), *cert. denied*, 484 U.S. 1006 (1988).

If the party seeking summary judgment meets this burden, then summary judgment will be granted unless there is significant probative evidence tending to support the opponent's legal theory. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 290, 88 S. Ct. 1575, 1593 (1968); *Commodity Futures Trading Com-*

mission v. Savage, 611 F.2d 270 (9th Cir. 1979). Parties seeking to defeat summary judgment cannot stand on their pleadings once the movant has submitted affidavits or other similar materials. Affidavits that do not affirmatively demonstrate personal knowledge are insufficient. *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979). Likewise, "legal memoranda and oral argument are not evidence and do not create issues of fact capable of defeating an otherwise valid motion for summary judgment." *Id.*

A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the differing versions of the truth. *See Admiralty Fund v. Hugh Johnson & Co.*, 677 F.2d 1301, 1305-06 (9th Cir. 1982); *Admiralty Fund v. Jones*, 677 F.2d 1289, 1293 (9th Cir. 1982).

All facts and inferences drawn must be viewed in the light most favorable to the responding party when determining whether a genuine issue of material fact exists for summary judgment purposes. *Poller v. CBS, Inc.*, 368 U.S. 464 (1962). After drawing inferences favorable to the respondent, summary judgment will be granted only if all reasonable inferences defeat the respondent's claims. *Admiralty Fund v. Tabor*, 677 F.2d 1297, 1298 (9th Cir. 1982).

The trilogy of Supreme Court cases cited above establishes that "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp.*, 477 U.S. at 327, *quoting* Fed. R. Civ. P. 1). *See also Avia Group Int'l, Inc. v. LA Gear Cal*, 853 F2d 1557, 1560 (Fed. Cir. 1988).

DISCUSSION

The Supreme Court has repeatedly held that for a private party to recover under the Clayton Act the party must show it has suffered "antitrust injury." *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 109 (1986); *ARCO v. USA Petroleum Co.*, 495 U.S. 328 (1990). This Court has already found that in this case a showing of "antitrust injury" must include a demonstration of "market power" by ARCO. *Rebel Oil., Inc. v. Atlantic Richfield Co.*, 133 F.R.D. 41, 44 (D. Nev. 1990).

In order to show that ARCO has market power, Rebel must demonstrate that ARCO (1) has a substantial market share and (2) there are entry barriers in the relevant market. *Id.* Without a showing by Rebel that ARCO possesses substantial market share, there is no market power and no antitrust injury to support Rebel's Section 4 antitrust claims against ARCO. Rebel has the burden of proving the scope of the relevant market. *DeVoto v. Pacific Fidelity Life Ins. Co.*, 618 F.2d 1340, 1344 (9th Cir.), *cert. denied*, 449 U.S. 869 (1980) (citing *Bhan v. Nme Hospitals, Inc.*, 669 F. Supp. 998, 1019 (E.D. Cal. 1987)).

In determining the relevant product market, the Court must consider the rule of reasonable interchangeability. *Brown v. Shoe Co.*, 370 U.S. 294, 325 (1962); *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956); *Twin City Sportservice., Inc. v. Charles O. Finley & Co.*, 512 F.2d 1264, 1271 (9th Cir. 1975), *cert. denied*, 459 U.S. 1009, (1982). "That is, where there is a high degree of substitutability in the use of two commodities, it may be said that the cross-elasticity of demand between them is relatively high, and therefore the two should be considered in the same market." 512 F.2d at 1271. The same analysis applies whether the market is viewed from the consumption standpoint or the production standpoint. *Id.*

Generally, a market includes "products regarded by consumers as such close substitutes that a slight relative price change in one will induce intolerable shifts of demand away from the other." Areeda & Turner vol. II, § 525a. (1978). For example, if consumers view products "A" and "B" as close substitutes, an increase in the price of product "A" will surely drive some of those consumers to switch to product "B". Therefore, the price of product "A" is significantly constrained by the presence of product "B" in the marketplace.

Rebel defines the relevant product market in this case as consisting of "all retail sales of gasoline, excluding sales with a substantial service component such as credit or full service," in Las Vegas. Affidavit of Prof. Leffler, ¶ 8, Affidavit of Prof. Allvine ¶ 2, Rebel's Motion for Partial Summary Judgment on Market Power (#360) at 14.

ARCO disputes Rebel's definition of the relevant market and asks the Court to adopt a broader definition which would include all retail sales of gasoline in Las Vegas regardless of whether credit or attendant services are offered.

In essence, Rebel claims that there are two distinct, economically relevant product markets for the retail sales of gasoline in Las Vegas: (1) self-serve, cash-only sales of retail gasoline, and (2) full-serve, credit sales of retail gasoline. ARCO argues that there are no such independent markets within the Las Vegas retail gasoline market.

Both parties agree that in defining the relevant product market, consumer preference is the important factor. Declaration of Prof. John R. Umbeck, ¶ 126, Supp. Affidavit of Professor Keith Leffler ¶ 8.

Rebel claims that there is an independent market for self-serve, cash-only gasoline based on consumer preference:

> ARCO markets gasoline based solely on price, offering cash only self-service. Some consumers, however, make their gasoline purchases based on the availability of attendant assistance; others purchase only where credit cards can be used; and, some consumers buy particular brands of gasoline due to perceived (and advertised) product differences. These consumers will not consider ARCO to be in competition with those stations offering these services. Hence, their purchases of gasoline with tied-in services are properly excluded in estimating Arco's economic significance to price sensitive gasoline purchasers.

Affidavit of Prof. Leffler at ¶ 8.

ARCO argues that there is not a separate market for cash-only, self-serve gasoline because the prices between the products (self-serve, cash-only as opposed to full-serve, credit gasoline) are highly correlated and thus viewed by consumers as practically identical: "In other words, if the movement of the prices of two products is highly correlated (that is, the prices move together), the goods are close substitutes and should be considered the same." Decl. Prof. Umbeck ¶ 130-133.

Rebel claims that the price and percentage of price differentials between the two alleged markets demonstrates a low price correlation which would require the finding of an independent market for self-serve, cash only sales of gasoline:

> Based on the data presented by Prof. Umbeck (Umbeck Figure 13) the price differential between gasoline sold in the two markets, far from remaining constant, varies from 21 cents to 53 cents per gallon and the percentage difference in the prices varies from 16% to 71%, as shown in Exhibits H and I, attached hereto. This price and percentage variations

demonstrate a low correlation in prices between the two markets.

Supp. Affidavit of Prof. Allvine at ¶ 15:

The Court finds the arguments advanced by ARCO to be more persuasive than those proposed by Rebel. If prices between competing products, such as gasoline, are highly correlated, then those products belong in the same market. Areeda & Turner ¶ 525.1c. (1990 Supplement).

Rebel's contention that price differentials between two products demonstrates a low correlation of prices between those two products is erroneous. "Correlation" refers to the amount of change in a price differential over a specific time period. Decl. Prof. Umbeck at ¶ 128, 129. Therefore, prices between competing products are highly correlated because they move together (when the price of product "A" increases or decreases, so does the price of product "B" and vice versa), and not because prices between those products differentiate.

From 1986, the first year for which Rebel could recover damages under the four-year limitation period of 15 U.S.C. § 15(b), until the present, the price differential between self-serve, cash-only gasoline and full-serve, credit gasoline has remained constant, at approximately 45 cents. See Figure 13, attached to Decl. of Prof. Umbeck, Supp. Affidavit, Prof. Allvine, Exhibits H and I. Such constancy supports this Court's finding that prices between self-serve, cash only gasoline and full-serve, credit gasoline are highly correlated and belong in the same market.

Additionally, the fact that one product is priced lower than other competing products does not require the former product to be placed in a separate market. Competing products are not in different markets simply because of the presence of price differentials. 512 F.2d at 1274. *See also E.I. du Pont de Nemours & Co.*, 351 U.S. at 401 (where the Supreme Court refused to place cellophane outside the flexible wrapping market even though it cost two to three times more than competing products).

Under the general principles of market definition enunciated above by the Supreme Court and the Ninth Circuit, the relevant product market must include all retail suppliers of gasoline. The fact that consumers choose one brand of gasoline over another because of service, quality, credit or price considerations does not lead to the conclusion that low price gasoline should be placed in a separate market. To the contrary, the fact that buyers will shift to other brands of gasoline if ARCO resorts to ultra-competitive pricing means that the relevant product market must include all retail supplies of gasoline in Las Vegas. Therefore, the Court concludes that the relevant product market in this case is all retail suppliers of gasoline in Las Vegas and not only those retailers who choose to sell their gasoline at a lower price by excluding other services.

Rebel argues that ARCO's share of the self-serve, cash-only market was 54.32% in 1991. Rebel's Motion for Partial Summary Judgment on Market Power, Exhibit I. This Court's definition of the relevant market makes it unnecessary to determine whether this 54.32% showing is sufficient to constitute a monopoly.

Rebel alternatively argues that ARCO possesses 44% of all retail sales of gasoline in Las Vegas, including those sales which offer credit or attendant services. Supp. Affidavit of Prof. Leffler at ¶ 16, Supp. Affidavit of Prof. Allvine at ¶ 9, Supp. Affidavit of Prof. Carroll, Table A. The record before the Court simply does not support Rebel's claim regarding ARCO's market share. Nonetheless, this Court finds Rebel's attempt to demonstrate that ARCO can exercise monopolistic pricing with a showing of 44% to be unpersuasive. This Court notes Judge Learned Hand's often-quoted dictum that while 90% of the market "is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three percent is not." *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2nd Cir. 1945) (quoted in *Twin City Sportservice, Inc.*

v. Charles O. Finley & Co., 512 F.2d 1264, 1274 (9th Cir. 1975)). This Court also recognizes the numerous cases finding that a 50% share of the market is inadequate to establish a monopoly. *See cases compiled in Twin City Sportservice*, 512 F.2d at 1274.

In addition to finding that Rebel has failed to demonstrate a genuine issue of material fact as to whether ARCO has a substantial market share, the Court also finds that Rebel has failed to demonstrate that there exist barriers to entry into the retail gasoline market in Las Vegas by other retail gasoline dealers. Indeed, the record in this case reflects relatively dynamic changes in the makeup of retail gasoline providers in Las Vegas. Therefore, this Court finds that Rebel has not shown that ARCO possesses market power within the relevant market for all retail suppliers of gasoline in Las Vegas. For this reason, ARCO's Motion for Summary Judgment must be granted and Rebel's Motion for Summary Judgment denied.

CONCLUSION

Defendant ARCO has demonstrated that there are no genuine issues of material fact with regard to market power. Plaintiff Rebel cannot, therefore, prevail on any of it's antitrust claims brought pursuant to Section 4 of the Clayton Act it's unfair trade practices claim brought pursuant to Nevada Revised Statute 598A.060. Accordingly, the Court will enter Judgment in favor of Defendant ARCO and against Plaintiff Rebel as to each of Rebel's claims brought in Counts 1, 6, 7 and 8.

ORDER

IT IS THEREFORE ORDERED that Rebel's Motion for Partial Summary Judgment on Market Power (#360) is hereby denied.

IT IS FURTHER ORDERED that ARCO's Motion for Summary Judgment (#273) is granted.

IT IS FURTHER ORDERED that the Clerk of Court shall forthwith enter Judgment in favor of Defendant ARCO and against Plaintiff Rebel as to Rebel's antitrust and unfair trade practices claims set forth in Counts 1, 6, 7 and 8 of Plaintiff's Second Amended Complaint (#92).

DATED: October 15, 1992

/s/ Philip M. Pro
PHILIP M. PRO
United States District Judge

APPENDIX D

[Filed Sep. 28, 1990]

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CV-S-90-076-PMP (RJJ)

REBEL OIL COMPANY, INC., and
AUTO FLITE OIL COMPANY, INC.,
Plaintiffs,

v.

ATLANTIC RICHFIELD COMPANY,
Defendant.

ORDER LIMITING DISCOVERY

The Amended Complaint (#9), filed March 27, 1990, on behalf of Plaintiff Rebel Oil Company, Inc., and Auto Flite Oil Company, Inc. (hereinafter "REBEL") alleges three claims for relief against Defendant Atlantic Richfield Company (hereinafter "ARCO").

REBEL brings this action under Section 4 of the Clayton Act seeking treble damages of at least $10,000,000 under three causes of action: Count I—illegal price discrimination under the Robinson-Patman Act, 15 U.S.C. § 13(a); Count II—illegal price-fixing conspiracy under Section 1 of the Sherman Act, 15 U.S.C. § 1; and Count III—illegal attempted monopolization under Section 2 of the Sherman Act, 15 U.S.C. § 2.

REBEL essentially claims that beginning in 1982, ARCO began executing a plan to monopolize the Las Vegas retail discount gasoline market and thereby destroy

effective competition from discount marketers like REBEL. REBEL alleges that ARCO schemed to lower its wholesale price of gasoline in Las Vegas below its cost and below its comparable prices in Los Angeles, despite the higher costs of transporting gasoline 250 miles by pipeline from Los Angeles to Las Vegas. REBEL further alleges that ARCO conspired with and coerced its independent dealers to fix the ARCO pump prices at correspondingly below-cost, predatory levels. As a result, alleges REBEL, ARCO's share at the Las Vegas discount gasoline market went from zero to at least an estimated 65% to 80% in less than five years. REBEL alleges that every significant independent discount gasoline marketer in Las Vegas, except REBEL, was put out of business by ARCO's predation.

Extensive discovery requests have been propounded by both parties, and to date REBEL has produced voluminous documents for inspection by ARCO.

Before the Court for consideration are Defendant ARCO's Motion for a Protective Order Limiting the Scope of Plaintiffs' Discovery (#24), filed May 29, 1990, and Plaintiffs' Cross-Motion to Compel Discovery from Defendant and for the Entry of a New Scheduling Order (#26), filed June 13, 1990.

By its Motion for Protective Order, ARCO asks the Court to limit the scope of Plaintiffs' discovery at the outset of this case to the threshold issue which ARCO contends may dispose of the entire action: whether significant entry barriers exist in the Las Vegas gasoline market. ARCO maintains that if REBEL is unable to meet the initial burden of showing that entry barriers exist, all other discovery sought by REBEL would be irrelevant and REBEL's challenge directed to ARCO's low price marketing strategy would fail.

REBEL responds that ARCO's Motion for Protective Order amounts to an effort to block virtually all of the

discovery which has been served on it in this action and amounts to an effort to "repeal discovery rules and rewrite antitrust law for this case."

Clearly the Federal Rules of Civil Procedure empower a district court to control the timing and order of discovery. Rule 26(c) provides in pertinent part that a district court "may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including [an order] . . . (4) that certain matters not be inquired into, or that the scope of discovery be limited to certain matters." Rule 26(d) allows the Court to issue an Order to control the sequence and timing of discovery "upon motion, for the convenience of the parties and witnesses and in the interests of justice." Rule 26 is a grant of power to impose conditions on discovery in order to prevent abuse of the court's processes, among other things. *Bridge C.A.T. Scan Associates v. Technicare Corp.*, 710 F.2d 940 (2nd Cir. 1983). Where appropriate, a district court may limit a party's discovery as long as the party is able to develop fully its case. *Mid-South Grizzlies v. Nat'l Football League*, 550 F. Supp. 558 (D.C. Pa. 1982), *aff'd* 720 F.2d 772 (3d Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984).

Whether the Court should exercise its authority to limit the timing and order of discovery as proposed by ARCO turns upon an application of principles of antitrust law to the allegations contained in REBEL's Amended Complaint.

The Requirement of "Antitrust Injury"

Section 4 of the Clayton Act, 15 U.S.C. sec. 15, furnishes the jurisdictional basis for all three private-party antitrust claims advanced in REBEL's Amended Complaint. That statute provides, *inter alia*, that "[A]ny person who shall be injured in his business or property

by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . ." 15 U.S.C. § 15(a). It also provides for treble damages and attorneys fees, creating incentives for private attorneys general. *Id.*

The Supreme Court has repeatedly held that a private party bringing an antitrust suit under Section 4 of the Clayton Act must prove[1] "antitrust injury." *See, e.g., ARCO v USA Petroleum Co.*, —— U.S. ——, 58 U.S.L.W. 4547, 109 L.Ed.2d 333 (decided May 14, 1990). A plaintiff can show antitrust injury by demonstrating that it suffered an injury that (1) is 'of the type the antitrust laws were intended to prevent' and (2) 'flows from that which makes defendants' acts unlawful.'" *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).

Recent Supreme Court cases make it clear that the antitrust injury requirement cannot be satisfied without a showing of predatory pricing. *ARCO v. USA Petroleum Co.*, Slip Opinion (decided May 14, 1990). The clarity with which this standard can be stated is misleading, however, because the concept of predation defies simple definition. The most commonly accepted indicia of predatory pricing is pricing below cost. What constitutes pricing "below cost" can in itself be a slippery concept. Most courts have adopted a modified Areeda-Turner test at least for the purposes of evaluating Sherman Act cases. *See, e.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585, n.8 (1986); *Transamerica Computer Co. v. IBM*, 698 F.2d 1377, 1386 (9th Cir. 1983); *ITT Continental Baking Co.*, 3 Trade Reg. Rep. ¶ 22,188 (FTC 1984). Under the Areeda-Turner test, a monopolist, or one with market power, who prices

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[1] *See infra*, pp. 7-8.

below marginal cost is presumed to engage in predatory pricing.[2]

Proof of Market Power

Explicit in the Areeda-Turner predation test is a requirement that the plaintiff show the defendant to be a monopolist or one with "market power." Market power exists when (1) a firm has a substantial market share and (2) there are entry barriers in a relevant market. *California v. American Stores*, 872 F.2d 837 (9th Cir. 1989), *rev'd on other grounds*, —— U.S. ——, 110 S. Ct. 1853, 109 L.Ed.2d 240 (1990); *Oahu Gas Service, Inc. v. Pacific Resources, Inc.*, 838 F.2d 360, 363 (9th Cir. 1988), *cert. denied*, 488 U.S. 870. Entry barriers are important to the extent that they indicate a company's ability to control prices or exclude competition in the relevant market. *Oahu Gas*, 838 F.2d at 366. The justification behind the entry barriers requirement is that if it is relatively easy for new firms to enter the market, a monopolist will not be able to raise its prices above a competitive level without thereby inviting new competition.

The Supreme Court has recently clarified that even when elements of the substantive antitrust laws are satisfied, a private plaintiff must still satisfy the Clayton Act section 4 requirement of antitrust injury. *ARCO v. USA Petroleum Co.*, Slip Opinion at 9 (decided May 14, 1990). For instance, in *USA Petroleum*, although plain-

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[2] Most courts have rejected the hard-to-calculate marginal cost standard and have replaced it with a calculation of reasonably anticipated average variable cost. *See, e.g., Transamerica Computer Co. v. IBM*, 698 F.2d at 1386. The Federal Trade Commission has held that there is a presumption of legality if defendants' prices are above average variable costs. This presumption becomes conclusive if the prices exceed average total costs. *ITT Continental Baking Co.*, 3 Trade Reg. Rep. ¶ 22,188 (FTC 1984). The FTC and others urge capital, executive, and administrative costs, sales expenses, and some elements of promotional expense to be included in the average variable cost computation. Areeda and Turner include only capital costs in their computation.

tiffs had demonstrated a per se violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, they had failed to prove the existence of predatory behavior. In the absence of such proof, summary judgment against them was proper. *Id.*

The Supreme Court explicitly adopted a requirement that all private antitrust plaintiffs demonstrate the existence of predatory behavior in the *USA Petroleum* decision. *Id.* The implicit message in the Supreme Court's decision is that all private antitrust plaintiffs must now demonstrate that defendants have market power. This demonstration entails showing that defendants have a substantial share of the relevant market and that there are entry barriers to that market. After market power is demonstrated, private antitrust plaintiffs must demonstrate the other aspects of predation: pricing below cost.

Standards for Adequacy of Demonstration

What constitutes an "adequate showing" regarding entry barriers in a relevant market is a difficult issue. The Ninth Circuit has established that both market definition and market power are essentially questions of fact appropriate for jury consideration. *Oahu Gas Service, Inc. v. Pacific Resources, Inc.*, 838 F.2d 360, 363 (9th Cir. 1989); *Twin City Sportservice v. Charles O. Finley & Co.*, 676 F.2d 1291, 1299 (9th Cir. 1982), *cert. denied*, 459 U.S. 1009 (1982); *Greyhound Computer Corp. v. International Business Machines Corp.*, 559 F.2d 488, 496-97 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978). Traditionally, questions of market definition and market power have been raised only in the context of substantive antitrust statutes such as Section 2 of the Sherman Act.

The Supreme Court has supplied the "antitrust injury" requirement of Section 4 of the Clayton Act. *ARCO v. USA Petroleum*, Slip Opinion (decided May 14, 1990); *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104

(1986); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). In its interpretation of Section 4 in the context of *USA Petroleum*, the Supreme Court does not clarify whether the "antitrust injury" requirement must be proven as a jurisdictional matter [3] to be decided by the trial court or whether it must be proven during the trial before a jury awards damages.[4]

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[3] At one point, the Court refers to *Cargill, Inc. v. Monfort of Colorado, Inc.*, stating that "we found that a plaintiff competitor had not shown antitrust injury and thus could not challenge a merger that was assumed to be illegal under § 7 of the Clayton Act . . ." *USA Petroleum*, Slip Opinion at 10. Later in that decision, the Court declares, "[W]e have previously recognized that even in cases involving *per se* violations, the right of action under § 4 of the Clayton Act is available only to those private plaintiffs who have suffered antitrust injury." *Id.* at 15 (emphasis in the original). A third time when the Court implies that the antitrust injury must be shown as a jurisdictional concern is where the Court states that it declines to dilute the antitrust injury requirement against vertical, maximum price-fixing schemes, "[i]f such a scheme causes the anticompetitive consequences detailed in *Albrecht*, consumers and the manufacturers' own dealers may bring suit." *Id.*, *referring to Albrecht v. Herald Co.*, 390 U.S. 145, 159 (1968), *reh'g denied*, 390 U.S. 1018. Finally, the Court declares that since "[r]espondent's injury . . . is not 'inextricably intertwined' with the antitrust injury that a dealer would suffer," it "does not militate in favor of permitting respondent sue on behalf of petitioner's dealers." *Id.* at 15-16, *quoting Blue Shield of Virginia v. McCready*, 457 U.S. 465, 484 (1982).

[4] "A private plaintiff may not recover damages under § 4 of the Clayton Act merely by showing 'injury causally linked to an illegal presence in the market.'" *ARCO v. USA Petroleum*, Slip Opinion at 4 (1990), *quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). Likewise, the Court declares, "The *per se* rule is a method of determining whether § 1 of the Sherman Act has been violated, but it does not indicate whether a private plaintiff has suffered antitrust injury and thus whether he may recover damages under § 4 of the Clayton Act." *Id.* at 12. Furthermore, "[t]he antitrust injury requirement ensures that a plaintiff can recover only if the loss stems from an competition-reducing aspect of effect of the defendant's behavior." *Id.* at 14 (emphasis deleted).

Obviously, some of the language which supports the interpretation that "antitrust injury" is a requirement to be satisfied before damages are awarded also supports the interpretation that it is a jurisdictional concern: it is axiomatic that if a suit is not allowed to go forward for lack of jurisdiction then the plaintiff will not collect any damages.

A Bifurcated Approach to Discovery

Proving that a defendant has engaged in pricing below cost entails extensive discovery regarding virtually all aspects of a company's business. On the other hand, discovery into relevant markets and entry barriers is a more discrete undertaking. Since under the recent Supreme Court's holding private antitrust plaintiffs such as REBEL must prove the existence of entry barriers and relevant markets, it makes sense for this Court to initially restrict discovery to those topics.

This bifurcated method of conducting discovery includes adequate safeguards to protect the rights of both REBEL and ARCO while greatly streamlining and potentially reducing to cost of the litigation. Burdensome discovery will be eliminated for those cases in which plaintiffs would have no chance of ultimately prevailing.

Conclusion

In focusing on the legitimate needs of the parties to this action for discovery, and in balancing the relative hardships faced by ARCO if the unlimited discovery sought by REBEL is granted as compared to the hardship faced by REBEL if discovery is limited, the Court concludes ARCO's Motion for Protective Order should be granted. ARCO would endure great hardship and expense if it had to comply at this time with the sweeping discovery requests made by REBEL. ARCO would have to present virtually every document in its possession or

control regarding its operations in Los Angeles and Las Vegas, including among other things those concerning such broad categories of activity as production, transportation and refinement of petroleum products. Additionally, officers and employees of ARCO would be subjected to depositions in these same subject areas. Yet, for the reasons stated above, most of the discovery sought by REBEL from ARCO would prove to be unnecessary unless REBEL can make an adequate showing of market definition and the existence of entry barriers into the Las Vegas retail gasoline market.

IT IS THEREFORE ORDERED that ARCO's Motion for Protective Order Limiting the Scope of Plaintiffs' Discovery (#24) is granted to the extent that REBEL's discovery of ARCO shall, until further Order of the Court, be limited to the issues of ARCO's share of the relevant retail gasoline market in Las Vegas and to the issue of whether entry barriers exist with respect to that market.

IT IS FURTHER ORDERED that REBEL'S Cross-Motion to Compel (#26) is denied.

DATED: September 28, 1990

/s/ Philip M. Pro
PHILIP M. PRO
United States District Judge

APPENDIX E

15 U.S.C. § 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 13. Discrimination in price, services, or facilities—Price; selection of customers

(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States

or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however*, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further*, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

15 U.S.C. §15. Suits by persons injured

(a) Amount of recovery; prejudgment interest

Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.